Supreme Court, U.S.
FILED

No. 041121 FEB 17 2005

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In The

Supreme Court of the United States

THORNBURY NOBLE, LTD.,

Petitioner,

v.

THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the Members of the Board of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON and ROBERT A. MacDONNELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX VOLUME I, PAGES 1 TO 183

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QUESTION PRESENTED FOR REVIEW

Egregious abuse of power at any level of government ought to shock the judicial conscience in a constitutional sense. Where such abuse involves intentional and callous disregard of the law, it ought to impel the Federal Courts to afford relief to an injured and innocent citizen. The Circuit Courts have stated an "essential purpose" of the "shocks the conscience" standard that results in an approach to review that is inconsistent with the approach taken by this Court in the land use arena. As a consequence, the Circuit Courts are deciding an important question of law, *i.e.*, how the "shocks the conscience" standard should operate in the land use setting. That question has not been, but ought to be, settled by this Court. The question presented for review is:

Whether actions taken by elected municipal officials that include knowing violations of state law and are intended to deprive one applicant of its property rights in order to favor another applicant for land use approvals constitute an abuse of official power that "shocks the conscience" in a constitutional sense.

CORPORATE DISCLOSURE STATEMENT

Thornbury Noble, Ltd. is a Pennsylvania limited partnership. The general partner of Thornbury Noble, Ltd. is TN Associates, LLC, a closely held Pennsylvania limited liability company. There are no subsidiaries or affiliates of Thornbury Noble, Ltd., or its general partner, that have issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Thornbury Noble, Ltd., the Petitioner, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The September 20, 2000 opinion and order of the United States District Court for the Eastern District of Pennsylvania is unreported and is reproduced at App. 9-18. The November 9, 2000 order of that Court is unreported and is reproduced at App. 19-20. The March 20, 2002 opinion and order of that Court is unreported and is reproduced at App. 21-63. The October 21, 2003 opinion and order of that Court is unreported and is reproduced at App. 64-80. The September 28, 2004 opinion and order of the United States Court of Appeals for the Third Circuit is unreported, but cited at 112 Fed.Appx. 185 (2004) and is reproduced at App. 1-8 The November 19, 2004 order denying rehearing en banc is reproduced at App. 81-82.

JURISDICTION

The United States Court of Appeals for the Third Circuit entered its judgment on September 28, 2004. The order denying rehearing en banc was entered on November 19, 2004. The jurisdiction of the Third Circuit was invoked pursuant to 28 U.S.C. §§1331 and 1343(a)(3). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 and Supreme Court Rule 10(c) in that this matter

involves an important question of federal law that has not been, but should be, decided by this Court.

RELEVANT PROVISIONS

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Section 1983 of 42 United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any act of Congress applicable exclusively to the

District of Columbia shall be considered to be a statute of the District of Columbia.

Pertinent provisions of Pennsylvania law include sections of the Pennsylvania Municipalities Planning Code, 53 P.S. §§10101, *et seq.*, as set forth in the Appendix and as follows: 53 P.S. §10501; §10503; §10503-A; §10603; and §10603.1. App. 83-98. Petitioner also relies on the *Analysis of Revisions to the Pennsylvania Municipalities Planning Code*, issued by the Local Government Commission of the General Assembly of the Commonwealth of Pennsylvania, January 1989. App. 99-104.

STATEMENT OF THE CASE

That this case involves an abuse of power by a municipal government cannot be denied. Nor will it be argued that every abuse of power by a municipal government constitutes an infringement on the constitutional rights of persons appearing before it. Where, however, the conduct that constitutes the abuse of power includes knowing violations of state law, and the blatant favoring of one citizen over another, that conduct must "shock the conscience" in a constitutional sense.

The instant matter is based on a complaint filed in the United States District Court for the Eastern District of Pennsylvania that alleges a denial of due process and equal protection in the consideration of an application for local land use approvals by a Pennsylvania municipality.

What is Sought

Petitioner seeks to have this Honorable Court state how the "shocks the conscience" standard of review should operate in the arena of local land use decisions. The Circuit Courts to date have invoked the standard to avoid judicial review of local government decisions rather than applying it to analyze the conduct at issue. This opens the door for unparalleled local government abuse of power that cannot be reconciled with the constitutional rights of the citizens of this country. The definition of how the "shocks the conscience" standard will be applied in the context of a land use application should be enunciated by this Court to provide a consistent framework for analysis by the Circuit Courts of Appeal and to settle this important question of federal law.

Facts Material to the Question Presented

Thornbury Township [hereinafter "the Township"] is a township of the second class located in Chester County, Pennsylvania, and duly organized and existing pursuant to the Pennsylvania Second Class Township Code, 53 P.S. §65101, *et seq*. It has enacted a zoning ordinance and subdivision and land development ordinance pursuant to enabling legislation known as the Pennsylvania Municipalities Planning Code [hereinafter "the MPC"], 53 P.S. §10101, *et seq*. The Township is governed by a five person Board of Supervisors, whose members are elected officials.

Petitioner, Thornbury Noble, Ltd. [hereinafter "Noble"], is the owner of real property in Thornbury Township. In 1993, Noble secured local land use approvals to build an L-shaped retail building on its property. App. 159-161. In November of 1997, Noble had an opportunity to bring a

supermarket to its property, which was a permitted use under the zoning ordinance. App. 119.

In order to provide the optimal traffic circulation plan on the property, a rezoning of approximately two (2) acres of residential property owned by Noble adjacent to its commercially zoned lands was needed. App. 188-189; 315-16. A supermarket could, even without the rezoning, be built on the property with a less favorable, but still acceptable, traffic circulation layout. App. 188; 326-27 and plans at App. 421-23. To secure the necessary Township approvals for the supermarket, Noble filed an application seeking alternative relief from the Township: either (i) a rezoning of the two (2) acres; or (ii) an amendment of the previously approved final land development plan. App. 245-47. The only difference between the plans is the layout and arrangement of parking and access. App. 245 and plans at App. 421-23.

At the same time that Noble was seeking approvals, a competitor, R.J. Waters & Associates [hereinafter "Waters"] was seeking a rezoning to permit its land in the Township to be developed as a shopping center, including a supermarket. App. 337-38. The Waters property is located in proximity to Noble's land.

It was commonly believed that only one additional supermarket would be built in the Township so that Noble and Waters were direct competitors for the supermarket. App. 420. It was also commonly accepted that the victor would be the landowner who could deliver the required permits and approvals faster. App. 399-400.

At first, the Waters application met with little favor from the Township while the Noble proposal was deemed "realistic and achievable". App. 315-16; 337; 343; 348; 355-56. As the parallel processes unwound, however, Waters

secured a decided advantage by offering to pay $600,000.00 to the Township for acquisition of open space. Noble was unaware of the offer, or that a "deal" had been struck. App. 363-64.

The "deal" with Waters was to be implemented by an amendment to the Zoning Ordinance that would rezone the Waters property and provide that shopping centers would be permitted by conditional use.[1] Since it was anticipated that only one supermarket would be built, the Township now had a vested interest in seeing that the Waters application secured its approvals before Noble's application. It also had the power to make that happen. One of the Supervisors stated the goal in writing. App. 399-400.

Noble, unaware of the deal, began to meet with opposition and delay in pursuing its goals. App. 214-17; 275-76. This only increased when Noble itself was asked for a monetary contribution for open space preservation and stated one would be made if required by statute. App. 217. There was no statute requiring such a payment.

The Township went on to adopt the rezoning for Waters and to condition its approval of the shopping center on the illegal donation. App. 371-95. Noble, however, after having been denied the rezoning of the two (2) acres, had persisted in its attempts to secure the amended land development plan approval to which it was entitled. App. 234-44; 280-81. In order to fully and finally frustrate

[1] A conditional use is a use permitted subject to a hearing process as a result of which the governing body may impose conditions on the use. 53 P.S. §10603(c)(2). It was no doubt chosen as the vehicle for the Waters application so that the Board could condition the approval upon payment of the $600,000.00 "voluntary" contribution.

Noble's efforts, the Township took the position that Noble's amended land development plan application required conditional use approval and invoked the very statute that it had enacted to facilitate the Waters deal. App. 282-83.

At that point, Noble knew that it could never catch up to the Waters application. The conduct of the Township had succeeded in preventing Noble from securing the approvals to which it was entitled. App. 326-27. Noble was forced to abandon its plans for a supermarket and to build an L-shaped shopping center on its land, which is a much less valuable use of the property.

As Noble proceeded with the L-shaped center, it became aware of the Township's actions and filed its complaint in the United States District Court for the Eastern District of Pennsylvania, which had jurisdiction under 28 U.S.C. §§1331 and 1343(a)(3) because Noble alleged that the actions of the defendants violated its Fourteenth Amendment rights and stated a cause of action under 42 U.S.C. §1983.

REASONS FOR GRANTING THE WRIT

The Important Federal Question

The parameters of the "shocks the conscience" standard in the land use context presents an important question of federal law that ought to be decided by this Court.

Protection against governmental arbitrariness is the core of due process. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). This includes the right of a landowner/developer to be free from intentionally irrational and arbitrary zoning actions. *City of Cuyahoga Falls, Ohio, et al. v. Buckeye Community Hope Foundation*, 538 U.S. 188

(2003). Just as this Court entered the land use arena to decide *Nollan et ux. v. California Coastal Commission*, 483 U.S. 825 (1987)[2], it should now enter that arena to provide a cogent definitional analysis of the "shocks the conscience" standard.

The Recent Land Use Decisions

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court applied the "shocks the conscience" standard in a matter involving a high speed chase that resulted in the death of a passenger on the motorcycle being pursued. There, this Court stated that: "[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'" citing *Collins v. Harker Heights*, 503 U.S. 115 (1992). *Id.* at 846.

In *City of Cuyahoga Falls*, this Court cited to *County of Sacramento* in holding that the conduct of the public official involved was not egregious or arbitrary government action. *Id.* at 198. The Court did not engage in any discussion of the standard since the conduct complained of there was clearly not egregious.[3]

In *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3rd Cir. 2003), the Third Circuit abrogated the "improper motive" standard that had been applied in land use cases and held that the "shocks the conscience" standard applies. Beyond calling the "improper

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[2] Whether an access condition on a development permit was sufficiently related to burdens created by the project to pass constitutional muster. *Id.* at p. 830.

[3] City engineer's refusal to issue a permit constituted a nondiscretionary, ministerial act consistent with the City Charter. *Id.* at 198.

motive" standard a "much less demanding test" [*Id.* at 400], the Circuit Court provided little analysis of how the "shocks the conscience" standard would operate in a land use context.

The Court concluded that the "shocks the conscience" standard is more demanding than the "improper motive" standard because "[t]he term 'improper' sweeps much more broadly, and neither Belo nor the cases that it spawned ever suggested that conduct could be 'improper' only if it shocks the conscience." *United Artists*, *supra.* at 400. Without guidance from this Court, the Circuits have begun to dismiss challenges as a matter of law where an improper motive has been demonstrated, such as in the instant matter. The leap from "improper motive" to the current posture where motive is not deemed relevant is too extreme. A balanced analysis where motive is one of the elements considered is much more in keeping with this Court's approach to constitutional analysis of governmental conduct.

After *United Artists*, the Third Circuit has routinely dismissed land use matters as not meeting the "shocks the conscience" standard as a matter of law. *See Eichenlaub v. Township of Indiana, et al.*, 385 F.3d 274 (3rd Cir. 2004); *Corneal v. Jackson Township*, 94 Fed.Appx. 76 (3rd Cir. 2004); *Lindquist v. Buckingham Township*, 106 Fed.Appx. 768 (3rd Cir. 2004). In *Eichenlaub*, the Court noted that the "shocks the conscience" test is clearly designed to avoid converting federal courts into super zoning tribunals. *Id.* at 285. This does not state a proper purpose of the "shocks the conscience" standard, however, because the standard itself was not enunciated in a land use context. The purpose of the standard is to determine when official action rises to the level of a violation of due process.

The Third Circuit has, therefore, altered the purpose of the "shocks the conscience" standard and now applies it in a land use context using a different barometer than the test itself requires. Once the goal becomes avoiding judicial review so as not to become a "super" zoning appeals board, the analysis of the "shocks the conscience" standard deprives landowners of meaningful federal remedies in light of egregious local government abuses.

Rather than substituting a goal of avoiding judicial review, the Circuit Courts should return to the definitional context of *County of Sacramento* itself and apply the standard as it is defined therein with appropriate analysis for the land use context. As this Court stated in *County of Sacramento*: "Deliberate indifference that shocks in one environment may not be so patently egregious in another . . . ". *Id.* at 850.

The Land Use Context

The MPC governs land use law in Pennsylvania. *Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743 (3rd Cir. 1982).

The MPC contemplates that a municipality will engage in comprehensive planning to form the basis of its land use ordinances. 53 P.S. §10603. App. 94-97. If implemented, the MPC provides for land use regulation based on sound land planning and not on the vagaries of a constantly changing political landscape.

The Supreme Court of Pennsylvania recently reiterated that the limit beyond which the power to zone in the public interest may not transcend is the protected property rights of individual landowners. *In Re: Appeal of*

Realen Valley Forge Greenes Associates, 838 A.2d 718, 728 (Pa. 2003).

It is in this context that the federal courts should conduct an analysis of whether actions of municipal officials in the land use setting "shock the conscience."

Abusive Governmental Action

In *County of Sacramento, supra.*, this Court describes the kind of official action that would "shock the conscience" as follows:

"Exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Id.* at 846.

"Government power arbitrarily and oppressively exercised." *Id.*

"The most egregious official conduct." *Id.*

"The Due Process Clause was intended to prevent government officials 'from abusing [their] power, or employing it as an instrument of oppression.'" *Id.* [citations omitted].

The "shocks the conscience" standard is not a "one size fits all" analysis. The particular circumstances of each case affect the outcome of application of the standard. Conduct that is merely negligent will fall below the threshold of constitutional due process, but conduct intended to injure in some way not justified by any government interest is the sort of official action that is "most likely" to rise to the conscience-shocking level. *County of Sacramento, supra.* at 849.

In a land use context, unlike the high-speed chase scenario of *County of Sacramento*, the governing body of the municipality takes official action with deliberation. It does not make decisions under duress. The governing body engages in an intentional process and almost invariably with access to legal counsel, as well as other advisors such as civil engineers and land planners. It is difficult to imagine a "negligent" land use determination.

In a land use context, rules govern official action. In Pennsylvania, state law dictates the parameters of the official action. Zoning must be based upon planning; exactions of contributions from landowners must be in compliance with the MPC to be legal. The power to zone and regulate land use, as with all government power, must be wielded fairly and impartially and it must be wielded in compliance with the law.

In the land use context, therefore, the "shocks the conscience" standard should apply not just to the outcome of the state process, but to the means employed. Even an otherwise justified purpose can be accomplished in a manner that "shocks the conscience" in a constitutional sense.

In *Nollan*, *supra*, the goal of the permit condition to preserve public access to beaches was not nefarious in any way. The method used to achieve the goal, however, ran afoul of the constitutional protections afforded landowners because the condition imposed placed an undue burden on the applicant that was so disproportionate to the benefit conferred as to constitute a taking without just compensation.

Nollan and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), provide an appropriate approach to the constitutional protections afforded landowners in the land use

context that is missing from the application of the "shocks the conscience" standard by the Circuit Courts in the land use arena. The analysis of land use actions by the Third Circuit, and the Eighth Circuit in *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992), do not approach the standard in the proper manner and, thus, have paved the way for rampant local government abuse of power.

What Happened Here

Thornbury Township and its Board of Supervisors abused their power in a most egregious way to deprive Noble of its property rights. The facts in this matter provide an opportunity for this Court to place the "shocks the conscience" standard in the proper perspective in the land use context.

The Township's Conduct

The Township engaged in a course of conduct in this matter that includes at least two instances of deliberate violations of the law of the Commonwealth of Pennsylvania: the selling of zoning to Waters; and the extraction of an illegal impact fee from Waters and the attempted extraction of such a fee from Noble. The totality of these actions, their motive and character, rise to the level of an egregious abuse of official power that meets the "shocks the conscience" standard. Noble was harmed by the actions of the Township, which were taken to favor Waters, a direct competitor to Noble. Because the Township's conduct that harmed Noble was taken with regard to an application by another landowner, Noble has no state remedy to redress that harm.

Waters wanted a rezoning; the application went badly. App. 337, 343, 348, 355-56. The Board made it clear to Waters, however, that it could obtain a rezoning, but only for a price. Such a "sale" of zoning violates Pennsylvania law. *Carlino v. Whitpain Investors*, 453 A.2d 1385 (Pa. 1982). (The power to zone cannot be surrendered or curtailed by bargain or its exercise controlled by considerations that enter into the law of contracts. *Id.* at 1388.) The allegations of Noble's complaint and the record in this matter establish that the rezoning of the Waters piece was blatantly given in return for the $600,000.00 payment, *i.e.*, Waters received its zoning approvals as a *quid pro quo* for the payment of $600,000.00. Had the payment been "voluntary," it would not have become a condition of Waters' approval. Had Waters not seen the payment as a *quid pro quo* for its zoning, it would have made the payment prior to the rezoning.

After Waters agreed to make the illegal payment, the Township asked Noble to do likewise. Noble refused. After that refusal, the Board systematically denied every request Noble made. The Township refused to approve the proposals of Noble for two reasons: 1) because Noble refused to comply with an illegal request for an unauthorized payment; and 2) to protect the payment of $600,000.00 from Waters, which payment would not be made if Waters did not win the race to secure approvals first.

The exaction of an illegal impact fee from Waters and the attempted exaction of an illegal impact fee from Noble violate Section 503 of the MPC. Preservation of open space is a legitimate municipal goal, but the manner in which the Township secured the payment from Waters, and attempted to secure payment from Noble, violates the law.

Section 503(11) was added to the MPC in 1988. In the *Analysis of Revisions to the Pennsylvania Municipalities Planning Code* issued by the Local Government Commission, the addition was explained as follows:

> The provisions of this clause are intended to avoid arbitrary and abusive application of such requirements [that new development contribute to traffic improvements, open space, etc.] by establishing basic 'ground rules' which are intended to limit municipal discretion.

App. 103.

A municipality cannot extract a fee to preserve open space except in compliance with Section 503.[4] Thornbury Township did not comply with Section 503 in extracting money from Waters and attempting to extract money from Noble.

There is no doubt that the Township deliberately favored Waters over Noble; the chairman of the Board of Supervisors put it in writing. In a memorandum dated March 24, 1998, he stated:

> One key issue is not having this[5] slow down the Waters' project since we want them to be able to lay the first brick to assure their supermarket will be the next one built to enable our funding

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[4] Seeking payment on account of recreation fees is an "impact fee" covered by Article V-A of the MPC. *Trojnacki v. Board of Supervisors of Solebury Township*, 842 A.2d 503 (Pa. Commw. 2004).

[5] A neighbor of the Waters' property had raised certain issues and concerns with the plan. App. 371-95, finding No. 13.

> for the next phase of the Dallet tract acquisition effort.

App. 400. He goes on to say that Noble was to be deprived of the approvals it sought, but no one advised Noble of that decision. App. 400. The memorandum described here was written **before** Noble had even submitted its formal application.[6] The Township watched as Noble expended time, effort, and money to achieve its valid land use goals knowing all along that it would not permit Noble to have the supermarket that the Township had decided would be given to Waters in return for an illegal payment.

In addition, another Supervisor interfered with Noble's agreement with Genuardi's supermarket. App. 209-10. Genuardi's had a letter of intent with Noble. Supervisor MacDonnell called the director of real estate for Genuardi's and told him that Noble would not get its approvals and told him to look into the Waters' property as an alternative location. App. 209-10.

The Township rushed to deny Noble's application; it did not wait for the Chester County Planning Commission review, which proved favorable to Noble. App. 409-11. It denied the application for rezoning on November 3, 1998, the same evening it approved Waters' rezoning and conditional use. App. 275-76. The Township had not yet acted, however, on the alternative request for an amended land development plan without the rezoning. App. 280-81.

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[6] Noble had been in informal discussions with the Township and had appeared at meetings of the Board of Supervisors to discuss its goal to bring a supermarket to its property. The formal application was submitted in October of 1998. App. 245.

The rezoning for Waters had little to do with sound principles of land use planning, as evidenced by the recommendation of the Chester County Planning Commission that the application be denied. App. 412-18. That recommendation was based on the conclusion that the proposal was inconsistent with the Township's land use policies and because of significant impacts on the road network. App. 412-18. Waters, however, had agreed to "pay good money" for its approvals and would have them regardless of merit.

After the November 3 meeting, Noble lost its deal with Genuardi's, but had the opportunity to secure SuperFresh as a tenant. App. 326. When Noble asked to have that application for an amended final plan placed on the Board's agenda for a decision, the Township, during a regularly scheduled meeting not attended by Noble, which had no reason to believe its application would be discussed, or by the Township solicitor, decided that Noble required conditional use approval to secure an amended final plan. App. 296. The minutes make it clear that the Township knew exactly what it was doing; the conditional use process would delay Noble and prevent it from securing a supermarket as a tenant. App. 296.

The Township's blatant abuse of power had achieved its end. It forced Noble to abandon its plans to build a supermarket. Instead, Waters built a supermarket and the Township received an illegal payment.

Noble had no remedy under state law to challenge the effect of the illegal agreement with Waters. The actions of the Township caused delay, as it knew they would, to allow Noble's competitor to secure an advantage over Noble. There would only be one supermarket built; the Township

made sure that Waters, not Noble, would build that supermarket. Noble has no redress in the state courts.

The Township knowingly violated the law in order to secure and retain an illicit payment of money from Waters and, to protect that ill-gotten gain, it trampled upon Noble's rights as a land use applicant.

The right to substantive due process is violated in a land use case where a municipality engages in egregious or arbitrary conduct. *City of Cuyahoga Falls*, *supra*. In determining whether conduct is egregious to the degree that it "shocks the conscience," the court should consider whether the conduct was intended to injure in some way unjustifiable by any governmental interest. *County of Sacramento*, *supra*. Such a determination is, by definition, fact specific and not "a calibrated yardstick." *Id.* at 1708.

In the instant case, the alleged governmental interest is to acquire open space. The facts established on the record, however, demonstrate that the open space was acquired by knowing violation of the laws governing the conduct of the Township in the land use context and by a blatant abuse of power to the detriment of Noble.

Whether or not the Township's conduct "shocks the conscience" in a constitutional sense, this Court should state the analysis for that determination in a land use context. If this matter is analyzed in the fashion that this Court approached *Nollan* and *Dolan*, Noble would not be precluded as a matter of law from taking this case to trial.

CONCLUSION

The purpose of the "shocks the conscience" standard is not to avoid judicial review of local government actions. The purpose of the standard is to determine when such local government actions constitute such an egregious abuse of power as to rise to the level of a constitutional violation. This Court should provide the appropriate analysis of the standard in the land use context.

For these reasons and those stated above, the petition for a writ of *certiorari* should be granted and the judgment below reversed.

Respectfully submitted,

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4476

THORNBURY NOBLE, LTD.

Appellant

v.

THORNBURY TOWNSHIP, ET AL.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 99-6460)
District Judge: Honorable Thomas N. O'Neill

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
September 28, 2004

Before: RENDELL, FUENTES, and
SMITH, *Circuit Judges*.

(Filed: October 18, 2004)

OPINION OF THE COURT

FUENTES, *Circuit Judge*.

Appellant Thornbury Noble ("Noble") is the owner of a property in Thornbury Township, Chester County ("the Township") known as "Thornbury Commons" ("the Property").

Noble had hoped to convince Thornbury Township Board of Supervisors ("the Board") to rezone the Property to allow for the construction of a box-shaped supermarket, but was unsuccessful. The Board, however, did grant another developer, Waters & Associates ("Waters"), the zoning changes necessary to build a supermarket at another site in the Township. Noble contends that Waters' zoning request was approved more quickly because Waters agreed to make a $600,000 contribution to the Township for the purchase of open space. Noble filed a four count complaint in the Eastern District of Pennsylvania against the Township, the Board, and members of the Board in their individual and official capacities (collectively referred to as "the Defendants"), which included a claim that Noble's substantive due process rights pursuant to 42 U.S.C. § 1983 had been violated.[1] Through a series of decisions, the District Court dismissed all the counts in the complaint. The substantive due process claim is what is before us on appeal.[2] We affirm the decision of the District Court because there is no genuine issue of material fact as to whether the actions of Defendants shock the conscience, even when viewed in the light most favorable to the plaintiff.

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[1] Section 1983 provides a cause of action for "any person who has been deprived of rights secured by the Constitution or laws of the United States by a person acting under color of law." *Curley v. Klem*, 298 F.3d 271, 277 (3d Cir. 2002). Noble's § 1983 claims here stem from alleged violations of substantive due process rights under the Fourteenth Amendment. The complaint also alleged: a violation of the Pennsylvania Municipalities Planning Code (Count II); a regulatory taking (Count III), and a claim for intentional interference with prospective contract (Count IV).

[2] The four issues Noble raised on appeal are all related to the substantive due process claim.

I. Factual and Procedural Background

The facts and evidence are adequately set forth in the District Court opinion, thus only the barest recitation is required here. Thornbury Noble, a limited partnership, is the owner of the Property in the Township. The Township is governed by the Board, a five member elected body. The Township has enacted a zoning ordinance which governs development in the Township. In November 1997, Noble sought to bring a supermarket to the property. A few years earlier, Noble had sought and received permission to develop an L-shaped retail center. To build the desired supermarket, however, the Property would have to be rezoned to permit a box-shaped building. While Noble was attempting to convince the Board to make the zoning changes, Waters was also trying to rezone a piece of property to permit the building of a shopping center that would include a supermarket. During a meeting to discuss Noble's zoning request, a Board member asked Noble's representative if he had any interest in making a voluntary contribution to help the Township acquire open space to compensate for the loss of residential zoning. The representative responded that a contribution would be considered if there were an ordinance asking for such a contribution. Waters, however, contributed $600,000 to the Township for the express purpose of purchasing additional open space. There was evidence that at least one Board member believed only one supermarket would get built and at least one Board member wanted the Waters supermarket built first. The Board approved the zoning changes requested by Waters. While Noble was fighting to have its zoning changes adopted, it lost two supermarket deals. The District Court originally dismissed the § 1983 claims against the individual Defendants in their official capacities, but

otherwise denied the Defendants' motions for summary judgment with respect to Count I. The Defendants, however, renewed their motions for summary judgment after this Court handed down *United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 392 (3d Cir. 2003). The District Court concluded that the actions of the Defendants did not meet the shock the conscience standard laid out in *United Artists* for making out a successful substantive due process claim in a land-use setting.

II. Standard of Review

When reviewing a grant or denial of summary judgment, "we apply the same test employed by the District Court under Federal Rule of Civil Procedure 56(c)." *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.,* 343 F.3d 669, 679-80 (3d Cir. 2003). Thus, a District Court's grant of summary judgment must be affirmed only if it appears that there is no genuine issue as to any material fact and that Appellees are entitled to a judgment as a matter of law. Id. In evaluating the evidence, we take the facts in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. *Id.*

III. Discussion

Noble argues that there are genuine issues of material fact as to whether the Defendants violated Noble's substantive due process rights. "The substantive component of the Due Process Clause can only be violated by governmental employees when their conduct amounts to an abuse of official power that 'shocks the conscience.'" *Fagan v. City of Vineland,* 22 F.3d 1296, 1303 (3d Cir. 1994) (en banc). Under Third Circuit law, the "shock the conscience"

standard applies to cases involving substantive due process claims challenging municipal land use decisions. *United Artists,* 316 F.3d at 401. "While the measure of what is conscience-shocking is no calibrated yard stick," *County of Sacramento v. Lewis,* 523 U.S. 833, 847 (1998), we do know that conscience shocking actions would violate the "decencies of civilized conduct," *Rochin v. California,* 342 U.S. 165, 172-73 (1952), and would be so " 'brutal' and 'offensive' that [they] did not comport with traditional ideas of fair play and decency." *Breithaupt v. Abram,* 352 U.S. 432, 435 (1957).

The most nefarious interpretation of the events that transpired before the Board would be that the Board privileged Water's zoning request over Noble's in exchange for Water's $600,000 contribution to the Township for the purchase of open space. Assuming that is the case, the actions of the Board would still not rise to the level of shocking the conscience because it is well-settled that the preservation of open spaces is a legitimate municipal goal. *Agins v. City of Tiburon,* 447 U.S. 255 (1980), overruled on other grounds by *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987). Because Defendants' actions do not constitute an abuse of power that shocks the conscience, Noble's substantive due process rights have not been violated.

Noble makes much of the District Court's observation that the actions of the Board were not undertaken for personal gain. Contrary to Noble's contention, the District Court did not conclude that only actions that personally benefit the Board members would meet the shock the conscience test. Instead, the District Court's observation suggested, correctly so, that soliciting a $600,000 contribution to line the pockets of the Board members is an act

different from soliciting a $600,000 contribution to secure open space. Since the contribution was expressly to pursue a legitimate town goal, neither the Board's motives nor their actions were improper.[3] Thus, we cannot find in the instant case that the Board's actions were unconstitutional.[4]

We have considered all of the other arguments advanced by the parties and conclude that they are without merit and no further discussion is necessary. Accordingly, the judgment of the district court will be affirmed.

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[3] Noble similarly misconstrues the District Court's observations regarding the Board's motive. Because the Board's motives were legitimate, it was not necessary for the District Court to decide whether an improper motive in the instant case would have transformed an otherwise legitimate action into one that shocked the conscience.

[4] Noble also raises on appeal the issue of qualified immunity for the individual Board members. We need not address the issue of qualified immunity because no constitutional violation occurred.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4476

THORNBURY NOBLE, LTD.

Appellant

v.

THORNBURY TOWNSHIP, ET AL.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
99-6460
District Judge: Honorable Thomas N. O'Neill

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
September 28, 2004

Before: RENDELL, FUENTES and SMITH,
Circuit Judges.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted on September 28, 2004.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the district

court entered October 22, 2003, be and the same is hereby affirmed.

Costs taxed against Appellant.

Attest:

/s/ Kathleen Brouwer
Chief Deputy Clerk

DATED: October 18, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	
	:	CIVIL ACTION
v.	:	No. 99-6460
THORNBURY TOWNSHIP, et al.	:	September 20, 2000
	:	
O'Neill, J.	:	

MEMORANDUM

(Filed Sept. 20, 2000)

Presently before me is defendants' motion to dismiss the complaint on a variety of grounds. For the reasons stated below, the motion will be denied in part and granted in part.

I.

For the purposes of this motion, I assume that the well-plead factual allegations in the complaint are true.

Plaintiff Thornbury Noble, Ltd. owns a property known as "Thornbury Commons" at the intersection of Routes 926 and 202 in Thornbury Township, Pennsylvania. Complaint ¶ 13. In March 1995, plaintiff received approval for a zoning and site plan for that property from defendant Thornbury Township Board of Supervisors (the "Board"). *Id.* ¶ 14. The plan called for an "L-shaped," strip-style building. *Id.* ¶ 15.

In November 1997, plaintiff sought to change the approved plan for Thornbury Commons to allow for a 50,000 square foot supermarket. *Id.* ¶ 16-18. The revised plan was taken before the Board on July 7, 1998. *Id.* ¶ 37-42. At that

meeting, two of the Board members requested a "contribution" from plaintiff in order to "compensate" the Township for the loss of residential zoning. *Id.* ¶ 41. Plaintiff declined to make such a contribution unless specifically authorized by ordinance. *Id.* ¶ 42, Exhibit F. One of the Board members responded that such contributions had previously been made to the Township "voluntarily." *Id.* Plaintiff continued to decline to make such a contribution because it believed such a payment would constitute "contract zoning" in violation of the Pennsylvania Municipalities Planning Code.[1] In November 1998, the Board rejected plaintiff's plans for a supermarket at Thornbury Commons. *Id.* ¶ 48.

Plaintiff further alleges that while the Board was considering its plans for a supermarket, R.J. Waters Associates, a second developer, was also pursuing plans for a supermarket at a second site in the Township. *Id.* ¶ 22. In that instance, Waters agreed to make a contribution of $600,000 to the Township in exchange for the rezoning that was necessary to build the supermarket. *Id.* ¶ 31. Plaintiff claims that the Board thereafter stopped considering its zoning requests on the merits in an effort to promote the Waters project. In support of this contention, plaintiff points to correspondence from one of the Board

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[1] The MPC states that: "No municipality shall have the power to require as a condition for approval of a land development or subdivision application the construction, dedication or payment of any offsite improvements or capital expenditures of any nature whatsoever or impose any contribution in lieu thereof, exaction fee, or any connection, tapping or similar fee except as may be specifically authorized under this act." 53 Pa.C.S.A. § 10503-A(a). In Count II, plaintiff contends that this solicitation of a "voluntary contribution" violated this provision of the MPC.

members which states: "One key issue is not having this [the concerns of an adjacent property owner about the Waters plan] slow down the Waters' project since we want them to be able to lay the first brick and assure their supermarket will be the next one built to enable our funding for the next phase of the Dallet tract acquisition effort." *Id.* ¶ 33, Exhibit E. The plan for the Waters' project was approved at the same meeting where the Board rejected the plan for plaintiff's project. *Id.* ¶¶ 48-49.

II.

In Count I, plaintiff alleges that defendants violated its substantive due process rights. Defendants' motion to dismiss this Count will be denied.

As a general matter, "federal courts are reluctant to sit as appeal boards for disputes between land developers and a Township's planning body." *Woodwind Estates, Ltd. v. W.J. Gretkowski,* 205 F.3d 118, 122 (3d Cir. 2000). Nonetheless, developers have a due process right to be free from "arbitrary and irrational zoning actions." *Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252, 263 (1977); *see also Bello v. Walker,* 840 F.2d 1124, 1129 (3d Cir. 1988) (a zoning action violates due process if it is "arbitrary, irrational, or tainted by improper motive"). This due process protection includes the right to be free from governmental decisions made for improper economic motives. *See Parkway Garage, Inc. v. City of Philadelphia,* 5 F.3d 685, 695 (3d Cir. 1993) (reversing the grant of a Rule 50 motion because jury could have reasonably concluded that City closed parking garage for an "improper economic motive" – namely, "the garage had considerably

more value to the City if it could relieve itself of the Parkway lease").

Plaintiff argues that the Board's rejection of its plan for a supermarket at Thornbury Commons violated this substantive due process right because: 1) consideration of its plan was made contingent upon its making a contribution to the Township that is allegedly illegal under state law; and 2) its plan was rejected in order to give an unfair advantage to another developer who had agreed to make such a payment. Defendants implicitly concede that if these allegations were proven a reasonable person could conclude that the Board acted with an improper motive. Defendants argue, however, that plaintiff can succeed with its claim "only if the [Board] could have had no legitimate reason for its decision." *Pace Resources, Inc. v. Shrewsbury Township,* 808 F.2d 1023, 1034 (3d Cir. 1987). Defendants further argue that the same documents plaintiff relies upon to create an inference of improper motive also state legitimate justifications for the Board's action. For example, the minutes of the July 7, 1998 Board meeting show that one of the members commented that "many residents are opposed to converting [the zoning at Thornbury Commons] from residential to commercial." *See* Complaint, Exhibit F at 2. Defendants believe that this evidence of competing motivations requires dismissal of this Count.

Defendants misconstrue plaintiff's burden. *Pace* did state in passing that "federal judicial interference with a state zoning board's quasi-legislative decisions . . . is proper only if the governmental body could have had no legitimate reason for its decision." *Pace,* 808 F.2d at 1034. However, the court's analysis of the complaint in that case was not as deferential to the Township as that one sentence would seem to imply. In holding that the complaint

failed to state a claim for a substantive due process violation, the *Pace* Court emphasized that a plaintiff need only "allege facts that would support a finding of arbitrary or irrational legislative action by the Township." *Id.* at 1035. In that case, the complaint failed to do so because it contained only "conclusory pleadings" that "fail[ed] to make *any* factual allegations that indicate irrationality." *Id.* (emphasis added). However, the *Pace* Court did not address the situation where, as in this case, the complaint contains specific factual allegations of improper motive but also provides benign alternative explanations for the questioned actions.

The Court of Appeals did, however, address a similar situation in *Bello.* In that case, the District Court entered summary judgment against a developer who claimed that municipal officials had improperly denied building permits. *Bello,* 840 F.2d at 1126-27. Plaintiffs claimed that the permits were denied "for partisan political or personal reasons unrelated to the merits of the application for the permits." *Id.* at 1129. Defendants presented "an arguably rational ground" for the denials; namely, "plaintiffs' failure to build in numerical sequence." *Id.* at 1130. The Court of Appeals contrasted this situation with the facts in *Pace* and concluded that "it is the factfinders' role to resolve this factual dispute." *Id.* On this basis, the summary judgment was reversed. *See also Woodwind Estates,* 205 F.3d at 125 (reversing the grant of a Rule 50 motion because evidence presented at trial "*could* provide a jury with a basis from which it could reasonably find that the decision of the defendants to deny approval [for a low-income housing subdivision plan] was made in bad faith or was based upon an improper motive") (emphasis added).

The issue in *Bello* and *Woodwind Estates* was whether the plaintiffs had amassed sufficient evidence from which a reasonable jury could find improper motives. Here, on a motion to dismiss, plaintiff has a lesser burden. It need only allege facts which if proved would be sufficient to support a finding of improper motive. Plaintiff has met its burden.

III.

In Count II, plaintiff claims that defendants violated § 10503-A(a) of the Pennsylvania Municipalities Planning Code during the July 7, 1998 Board meeting when plaintiff was asked to make a "voluntary contribution" to "compensate" the Township for the loss of residential zoning. Defendants argue that the MPC claim is untimely because it was not filed within 30 days of the Board's decision.

However, it is unclear whether there is a private cause of action under the MPC, and plaintiff concedes that it cannot point to "any case law that establishes a separate cause of action for a violation of the MPC." Plaintiff's Mem. at 15. Therefore, before reaching the statute of limitations issue I will Order the parties to brief the question of whether there is a private cause of action under the MPC.

IV.

In Count III, plaintiff claims that defendants effected a temporary regulatory taking of Thornbury Commons during the period in which the Board was considering the supermarket zoning plan. Defendants' motion to dismiss this Count will be granted.

The Fifth Amendment prohibits private property from "be[ing] taken for public use, without just compensation." Since Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922), the Supreme Court has consistently held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The Court has since "described at least two discreet categories of regulatory action" that are compensable as takings. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992). The first category comprises those regulations that "compel the property owner to suffer a physical 'invasion' of his property." *Id.* The second category comprises those regulations that "den[y] all economically beneficial or productive use of land." *Id.* Moreover, in *First English Evangelical Lutheran Church of Glendale v. Los Angeles,* 482 U.S. 304, 318 (1987), the Court recognized that a temporary regulatory taking is not "different in kind" from a permanent deprivation.

Since it is clear that plaintiff's property was never physically invaded, its taking claim can survive only if it can allege that it was denied "all use" of it [sic] property for the period of time in question. *See Bello,* 840 F.2d at 1130. It is not enough for plaintiff to allege that it was "merely denied a particular [] permit, [but] retained the right to put [its] land to a variety of alternative uses." *Id.* However, that is exactly what happened. Although plaintiff experienced delays in the Board's consideration of its plan for a supermarket, throughout that period plaintiff had approvals for its "L-shaped," strip mall plan. In fact, when the supermarket plan was finally rejected, plaintiff proceeded with that original plan. *See* Plaintiff's Mem. at 8. Although the supermarket plan may have been more

profitable, plaintiff was not denied all economically beneficial use of its land. Therefore, there was no temporary taking and Count III will be dismissed.

V.

In Count IV, plaintiff asserts a state law claim for intentional interference with contractual relations. Defendants' motion to dismiss this Count will be granted as to defendants Thornbury Township and Thornbury Township Board of Supervisors but denied as to the individual Board members.

Defendants argue that this tort claim is barred by the immunity afforded to municipalities and their officials by the Political Subdivision Tort Claims Act. *See* 42 Pa.C.S.A. § 8541, *et seq.* Plaintiff concedes that the municipal defendants are immune from suit, but argues that the individual Board members are not immune from claims for intentional torts, including intentional interference with contractual relations.

42 Pa.C.S.A. § 8550 provides that there is no immunity for municipal officials that cause injury through "a crime, actual fraud, actual malice or willful misconduct." In *Delate v. Kolle,* 667 A.2d 1218, 1221 (Pa. Commw. 1995), the court applied that provision to a case arising from a zoning dispute and held that "the mere failure to reach the correct legal conclusion in a zoning case does not constitute the type of purposeful conduct which is necessary for a finding of willful misconduct [within the meaning of § 8550]." However, the court went on to note that in this context "willful misconduct" is synonymous with the term "intentional tort." *Id.* Therefore, individual zoning board members could be held liable if they "intentionally reached

the wrong decision knowing that it was wrong, acted from corrupt motives, or engaged in any other type of conduct which would demonstrate willful misconduct." *Id.*

I therefore hold that if it were confronted with the issue the Pennsylvania Supreme Court would find that the intentional interference with contractual relations alleged here constituted willful misconduct within the meaning of § 8550 and *Delate.* On this basis, I will deny the motion to dismiss Count IV as to the individual Board members but grant it as to the municipal defendants.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	
	:	CIVIL ACTION
v.	:	No. 99-6460
THORNBURY TOWNSHIP, et al.	:	

ORDER

AND NOW, this 20 day of September, 2000, after consideration of defendants' motion to dismiss, and plaintiff's response thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that:

1. Defendants' motion to dismiss Count I (substantive due process) is DENIED;

2. Defendants' motion to dismiss Count II (violation of the Pennsylvania MPC) is DENIED WITHOUT PREJUDICE subject to renewal within 20 days with appropriate briefing on whether there is a private cause of action under the Pennsylvania MPC. Plaintiff may respond 20 days thereafter;

3. Defendants' motion to dismiss Count III (temporary regulatory taking) is GRANTED;

4. Defendants' motion to dismiss Count IV (intentional interference with contractual relations) is GRANTED as to defendants Thornbury Township and Thornbury Township Board of Supervisors and DENIED as to the remaining defendants.

/s/ TN O'Neill
THOMAS N. O'NEILL, JR., J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	
	:	CIVIL ACTION
v.	:	No. 99-6460
THORNBURY TOWNSHIP, et al.	:	

ORDER

(Filed Nov. 9, 2000)

AND NOW, this 9 day of November, 2000, after consideration of defendants' motion to dismiss Count II (violation of the Pennsylvania Municipalities Planning Code), and plaintiff's response thereto, it is hereby ORDERED that the motion is GRANTED and Count II is DISMISSED.

By Memorandum and Order dated September 20, 2000, I dismissed portions of plaintiff's complaint and ordered the parties to brief whether a private cause of action exists under the Pennsylvania Municipalities Code. After consideration of those briefs, I will dismiss Count II of the complaint because I believe that if presented with the issue the Pennsylvania Supreme Court would rule that no such cause of action exists.

The parties agree that the MPC contains no explicit private cause of action for the type of violation plaintiff complains of and there is no case law recognizing such a cause of action. In such situations, Pennsylvania courts look to three factors. First, is the plaintiff part of the class for whose benefit the statute was created? Second, is there an indication of legislative intent, explicit or implicit, either to create or deny such a remedy? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy? *See Alfred M. Lutheran*

Distribs., Inc. v. A.P. Weilersbacher, Inc., 650 A.2d 83, 87 (Pa. Super. 1994).

In this case, the second factor is dispositive. 53 Pa.C.S.A. § 11001-A states that: "The procedures set forth in this article shall constitute the exclusive mode for securing review of any decision rendered pursuant to Article IX [relating to Zoning Hearing Board Proceedings] or deemed to have been made under this act." This is an explicit statement of legislative intent that limits the remedies available to plaintiff under these circumstances to mediation (53 Pa.C.S.A. § 10908.1) or an action in Mandamus (53 Pa.C.S.A. § 10910.1).

Plaintiff's argument that § 10503(11) should be read *in pari materia* to § 10506-A (thereby creating a private cause of action) fails for the same reason. The *in pari materia* rule of statutory construction applies only when a statute is ambiguous. *See In re McFarland's Estate,* 105 A.2d 92, 95 (Pa. 1954). The unambiguous language of § 11001-A leaves no room for the application of the *in pari materia* rule of construction. Moreover, even if *in pari marteria* did apply, the civil cause of action that plaintiff asks be recognized is far broader in scope than an appeal under § 10506-A.[1]

/s/ TN O'Neill
THOMAS N. O'NEILL, JR., J.

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[1] 53 Pa.C.S.A. § 10506-A provides for an appeal from an assessment of an impact fee. Appeals are available to persons who have been "required" to pay an impact fee and the only relief available is a modification or recession of the assessment at issue. *Id.* In this case, plaintiff was not "required" to pay any fee to the Township and, in fact, did not pay any fee to the Township.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	CIVIL ACTION
v.	:	
THORNBURY TOWNSHIP, et al.	:	NO. 99-6460
O'NEILL, J.		MARCH 19, 2002

MEMORANDUM

(Filed Mar. 20, 2002)

Presently before me is defendants' motion for summary judgment on the remaining counts of plaintiff's complaint. For the reasons stated below, the motion will be granted in part and denied in part.

BACKGROUND[1]

Plaintiff Thornbury Noble owns property (hereinafter referred to as "Thornbury Commons") at the intersection of routes 926 and 202 in Thornbury Township, Chester County, Pennsylvania. Thornbury Commons is zoned "B" Business, and Thornbury Noble secured approval of a final zoning and site plan for the construction of an "L-shaped," strip-style complex of retail stores from defendant Thornbury Township Board of Supervisors ("the Board") on March 7, 1995. Sometime thereafter plaintiff received letters from SuperFresh and Genaurdi's supermarkets, each of which expressed an interest in building a store on Thornbury Commons. In November of 1997, Thornbury

[1] As it is defendants who have moved for summary judgment all facts are construed in the light most favorable to plaintiff.

Noble decided to change the previous plan and replace the "L-shaped" retail building with a 50,000 square foot "box-shaped" supermarket. In order to improve access and on-site traffic circulation, Thornbury Noble proposed to re-zone two acres of adjacent residential property to "B" Business. On December 16, 1997, representatives of Thornbury Noble and Genaurdi's submitted a concept plan to the Board for a box-shaped building housing a Genaurdi's supermarket.

The new plan was discussed at a Board meeting attended by representatives of Thornbury Noble, Genaurdi's, and residents living near Thornbury Commons on July 7, 1998. At that meeting defendant board member William Schmidt asked plaintiff's representative if plaintiff had "any interest in helping the township with open space to compensate for the loss of residential zoning." Plaintiff asserts that it declined to make such a contribution because it was not required under Thornbury Township Ordinances. When plaintiff's representative brought this to the attention of the Board during the meeting, defendant board member Robert MacDonnell responded by stating that such contributions had previously been made voluntarily. The status of Thornbury Noble's requested re-zoning was left unresolved by the Board at meetings throughout the summer of 1998. In the interim Thornbury Noble was advised by its attorney and civil engineers that a supermarket could be built under the zoning permits it had already obtained for the construction of the L-shaped building complex. Sometime after the July 7, 1998 meeting, Richard Dugan, Genaurdi's real estate director, contacted MacDonnell in an attempt to learn the Board's position on re-zoning Thornbury Commons. MacDonnell told Dugan that the Board did not look favorably on re-zoning and as a

result Genaurdi's opted to look elsewhere to lease super market space.

On October 6, 1998, Thornbury Noble submitted an application for amendment of its prior approved plan to allow construction of a food market on Thornbury Commons as currently zoned or in the alternative for the re-zoning as it had previously proposed on July 7, 1998. The application was forwarded by the Board for review by the Chester County Planning Commission, the Thornbury Township Planning Commission, and the Township Engineer.[2] On November 3, 1998, the Board rejected plaintiff's request to re-zone the two acres. Although too late to affect the Board's decision, by letter dated November 23, 1998, the Chester County Planning Commission recommended that plaintiff's re-zoning request be approved. Plaintiff's alternative request to amend its former final plan and build the supermarket on Thornbury Commons as currently zoned was not resolved at the November 3, 1998 meeting.

After failing to secure a contract with Genaurdi's Thornbury Noble entered into discussions with SuperFresh with the aim of building the supermarket on the property as currently zoned. On January 13, 1999, representatives from SuperFresh presented a sketch plan to the Township Planning Commission demonstrating that Thornbury Commons could sustain a supermarket with the current permits granted to Thornbury Noble for the construction of its L-shaped shopping complex. On January

[2] These entities provide non-binding recommendations to the Board of Supervisors.

19, 1999 the Board determined that the plan submitted by Thornbury Noble on October 6, 1998 was not an "amended" plan but would be considered as an entirely new application for land development. Further, by letter dated February 3, 1999, the township solicitor informed plaintiff's counsel that this new application would also require "conditional use approval" as well. These determinations required further substantial delays in securing approval for any potential development plan for Thornbury Commons, and as a result SuperFresh allegedly abandoned its plan to build a store on plaintiff's property. According to plaintiff it was "forced" to proceed with the original "L-shaped" shopping center.

The crux of plaintiff's complaint is that defendants' motives in denying Thornbury Noble's zoning requests were improper. In support of this assertion, plaintiff alleges that while the Board was considering Thornbury Noble's plans for a supermarket R.J. Waters & Associates, a second developer, was also pursuing plans for a supermarket at another site in the Township. According to plaintiff the Board was initially opposed to the development of the tract owned by Waters. However after agreeing to make a contribution of $600,000 to the Township, Waters was granted the re-zoning necessary to build a supermarket. Plaintiff claims that the Board thereafter stopped considering Thornbury Noble's zoning requests in an effort to promote the Waters project and actively encouraged Gernuardi's to locate its grocery store on the Waters' tract, assuring Genaurdi's that Waters' approvals would be forthcoming sooner than Thornbury Noble's. The plan for the Waters' project was approved on November 3,

1998 at the same meeting at which the Board rejected plaintiff's re-zoning request.

PROCEDURAL HISTORY

On December 17, 1999, Thornbury Noble filed the instant suit against Thornbury Township, its current Board of Supervisors and five individuals who were members of the Board during the period relevant to this law suit: Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Charles A.W. Wilson, and Robert A. MacDonnell. Plaintiff's suit alleged: a violation of its civil rights pursuant to 42 U.S.C. § 1983 (Count I); violation of the Pennsylvania Municipalities Planning Code (MPC), 53 Pa. Cons. Stat. § 10503(11) (Count II); a regulatory taking (Count III); and a claim of intentional interference with prospective contract (Count IV). On September 20, 2000, I granted defendants' motion to dismiss Count III in its entirety, and Count IV as to the Township and Board only. On November 9, 2000 I granted defendants' motion to dismiss Count II in its entirety. Before me now are motions for summary judgment filed by Thornbury Township and the Board (hereinafter "the municipal defendants") on Count I and by the individual defendants on Count I and Count IV.

STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of

law." Fed. R. Civ. P. 56(c). My task is not to resolve disputed issues of fact, but to determine whether there exist any factual issues to be tried. *See Andersen v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-49 (1986). In making this determination, all of the facts must be viewed in the light most favorable to the non-moving party. *Id.* at 248. However, the non-moving party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion, and cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions. *Williams v. Borough of W. Chester,* 891 F.2d 458, 460 (3d Cir. 1989). "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent." *Big Apple BMW, Inc. v. BMW of North America, Inc.,* 974 F.2d 1358, 1363 (3d Cir. 1992).

DISCUSSION

All defendants move for summary judgment with respect to plaintiff's § 1983 claim on the grounds that plaintiff has failed to establish a property right entitled to protection, plaintiff's claim is not ripe and plaintiff has failed to allege sufficient evidence of improper motive. In addition the individual defendants have raised various immunity defenses and also have moved for summary judgment on plaintiff's claim of intentional interference with prospective contract.

I. § 1983

To establish a claim under § 1983,[3] plaintiff must show that its federal statutory or constitutional rights were violated by a person or entity acting under color of state law. *See Flagg Bros., Inc. v. Brooks,* 426 U.S. 149, 155 (1978). Plaintiff's § 1983 claim alleges a violation of its substantive due process rights under the Fourteenth Amendment. Defendants[4] have opted to address plaintiff's claim in two parts: (1) the denial of plaintiff's request to re-zone a portion of Thornbury Commons to better accommodate a supermarket, and (2) the classification of plaintiff's alternative request to amend its prior plan as a "new" application requiring a conditional use application. These two plans were submitted by plaintiff as alternatives at the same time on October 6, 1998. The individual defendants assert without citation that "[i]n light of the two vastly different forms of government action at issue, [I] must employ separate analyses" in evaluating the decisions of the Board. (Ind. Def.'s Br. at 1-2).

Throughout their briefs defendants address these two "decisions" as if they are totally unrelated. Defendants' submissions contain rhetoric laden statements such as: "plaintiff is attempting to change the law of the state . . .

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[3] 42 U.S.C. § 1983. Section 1983 provides in relevant part: "Every person . . . who, under color of any statute, ordinance [or] regulation . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws [of the United States], shall be liable to the party injured."

[4] The individual defendants "adopt[ed] and incorporate[d] by reference the arguments presented by [municipal defendants] that plaintiff has failed as a matter of law to demonstrate any claim under 42 U.S.C. § 1983." (Ind. Def.'s Br. at 15).

by ignoring legislative immunity and overlooking the ripeness doctrine . . ."; plaintiff "is now before the Court claiming it should have gotten a bigger development", *id.* at 2; "[n]o court . . . has extended substantive due process to protect the right of a landowner to have its property zoned in any manner the landowner wishes", (Mun. Def.'s Br. at 9); and "[i]n a vain effort to create a genuine issue of material fact, plaintiff attempts to blur the distinction between a request for rezoning and an application for approval of a land development plan," (Ind. Def.'s Rep. Br. at 1). In my view these statements mischaracterize plaintiff's claim. Plaintiff is not challenging the power of the Board to render the decisions it made, but rather the manner in which it made them. Plaintiff contends that it is entitled to have those decisions made free from biased or improper motivations.

Plaintiff has provided evidence that its development plan was deliberately impeded in favor of the Waters project following Waters' $600,000 "voluntary contribution" to the township. According to plaintiff, the Board's actions are not separable and the Board's designation of plaintiff's "amended" plan as a "new" plan requiring a conditional use application was simply "a continuation of the earlier plan by the Township to thwart Thornbury Noble's effort to build a supermarket on the property." (Pl. Br. in Opp. to Mun. Def.'s at 22-23). However, as defendants have chosen to structure their motions for summary judgment by addressing the two "decisions" of the board separately I will address each issue in the order raised.

Defendants claim that plaintiff cannot claim a substantive due process violation under § 1983 with respect to the Board's denial of its re-zoning request because it cannot establish that a fundamental property interest was

affected by the Board's decision. With respect to the Board's treatment of plaintiff's alternative amended plan defendants argue: (a) this determination is not ripe for adjudication, and (b) there is insufficient evidence to support plaintiff's claim of improper motive.

A. Property Right

Plaintiff may not proceed with its § 1983 claim unless it can establish that it possessed a property interest worthy of substantive due process protection. *See Independent Enterprises, Inc. v. Pittsburgh Water and Sewer Authority,* 103 F.3d 1165, 1179 n. 12 (3d Cir. 1997) ("Regardless of whether the decision was motivated by bias, bad faith, or partisan or personal motives [p]laintiff cannot maintain a substantive due process claim unless it can demonstrate that [d]efendants infringed a fundamental property right of [p]laintiff."). Defendants have moved for summary judgment on the grounds that Thornbury Noble "did not possess a property right to have [a portion of its property] re-zoned to commercial in order to build the supermarket on the site." (Mun. Def. Br. at 9). Defendants assert that under Pennsylvania law a land owner has no "vested right" in the continuation of a zoning classification, much less a request to re-zone a parcel of land, and that Pennsylvania courts have consistently held that the decision to re-zone is solely at the discretion of the governing body acting in its legislative capacity. Relying on the Court of Appeals' statement in *Acierno v. Cloutier,* 40 F.3d 597, 616 (3d Cir. 1994) that "when analyzing substantive due process claims courts are required to turn to state and local law to determine whether the plaintiff possessed a property interest which was abrogated by government action," defendants contend that "[p]laintiff enjoyed no

entitlement to re-zoning . . . and did not possess a property right worthy of substantive due process protection." (Mun. Def. Br. at 9).

The Court's statement in *Acierno,* however, took place in the context of its determination that a town council was entitled to qualified immunity from suit because the *Acierno* plaintiff did not have a "clearly established constitutional right" to develop his property in the manner he sought. *Acierno* does not stand for the proposition that simply because state law grants a government agency unfettered discretion in making decisions affecting individual property rights that those rights are therefore automatically placed outside federal substantive due process protections. In *DeBlasio v. Zoning Board of Adjustment,* 53 F.3d 592, 600 (3d Cir. 1995), the Court stated: "in order to state a substantive due process claim, a plaintiff must have been deprived of a particular quality of property interest." In subsequent decisions the Court has acknowledged that "the case law of this circuit and the Supreme Court provides very little guidance as to what constitutes this 'certain quality' of property interest worthy of protection under the substantive due process clause." *Nicholas v. Pennsylvania State University,* 227 F.3d 133, 140 (3d Cir. 2000) (citations and internal quotations omitted). Nevertheless, according to the Court of Appeals, "the case law does reveal one guiding principle: whether a certain property interest embodies this 'particular quality' is not determined by reference to state law, but rather depends on whether that interest is 'fundamental' under the United States Constitution." *Id.*

In *DeBlasio* the Court stated:

> [In] the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached. Where the plaintiff so alleges, the plaintiff has, as a matter of law, impliedly established possession of a property interest worthy of substantive due process protection.

53 F.3d at 601. Defendants attempt to distinguish Thornbury Noble's situation from that at issue in *DeBlasio* by stating:

> It is important to point out that the [p]laintiff in *DeBlasio* did not seek rezoning of his property, but a use variance under state law which may be granted by a zoning authority under certain conditions. It is not the type of land use decision in which the zoning authority has absolute legislative discretion as in the case of a rezoning request.

(Mun. Def.'s Br. at 10, n. 3). Apparently defendants contend that the *DeBlasio* Court's statement regarding "governmental decisions that impinge upon a landowner's use and enjoyment of property" does not encompass rezoning decisions.[5] I disagree. *See Independent Enterprises,* 103 F.3d at 1179 n. 12 (noting that cases involving "zoning

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[5] The basis for this contention appears to stem from defendants belief that the decision the Board rendered was a "legislative act" that cannot be challenged as a substantive due process violation. I will discuss any immunities to which defendants may be entitled below.

decisions, building permits, or other governmental permission required for some intended use of land owned by the plaintiffs . . . implicate[s] the 'fundamental' property interest in the ownership of the land."); *Bello v. Walker,* 840 F.2d 1124, 1129 (3d Cir. 1988) (holding that the denial of building permits by a municipality for reasons unrelated to the merits of the permit applications implicated a fundamental due process right); *Neiderheiser v. Borough of Berwick,* 840 F.2d 213, 218 (3d Cir. 1988) (holding that a lessor who had been denied an exemption from a zoning ordinance stated a substantive due process claim by alleging that the exemption application was arbitrarily and irrationally denied); *United Artists Theatre Circuit, Inc. v. The Township of Warrington,* No. Civ. A. 98-5556, 2001 WL 936638 at *2 (E.D. Pa. Aug. 15, 2001) (denying defendants' motion for summary judgment where plaintiff's substantive due process claim arose out of two competing land use applications and plaintiff alleged its application was disfavored because of its failure to contribute a voluntary "impact" fee to the township).

B. Ripeness

Defendants also contend that plaintiff's claim of a substantive due process violation arising out of the Township's classification of its alternative amended plan as a "new" plan requiring a conditional use application should be dismissed on the grounds that it is not ripe for adjudication. Ripeness is one aspect of justiciability. It "determines when a proper party may bring an action." *Armstrong World Industries, Inc. v. Adams,* 961 F.2d 405, 411 (3d Cir. 1992). The function of the ripeness doctrine is to prevent federal courts, "through avoidance of premature adjudication, from entangling themselves in abstract

disagreements." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148 (1967), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 105 (1977). In short, ripeness is a question of timing that addresses "when . . . it [is] appropriate for a court to take up the asserted claim." *Felmeister v. Office of Attorney Ethics,* 856 F.2d 529, 535 (3d Cir. 1988) (internal quotations omitted).

In *Taylor Investment, Ltd. v. Upper Darby Township,* 983 F.2d 1285, 1292 (3d Cir. 1993), a zoning officer had revoked a tenant's use permit and the Court held that the tenant's § 1983 claim was not ripe because the tenant had not given the municipality an opportunity to make a final determination with respect to the construction of the applicable ordinances. Specifically, the tenant had not reapplied for the permit, appealed the revocation to the Township Zoning Board or sought a variance or special exception to the township's zoning ordinances. *See id.* at 1289. Similarly, in *Sameric Corp. of Delaware, Inc. v. City of Philadelphia,* 142 F.3d 582, 598 (3d Cir. 1998), the Court held that because plaintiff had not completed its appeal of the city's denial of a demolition permit the denial was not final and therefore plaintiff's substantive due process claim was not ripe for adjudication. In arriving at this determination the *Sameric* court stated:

> It is well established that, in cases involving land-use decisions, a property owner does not have a ripe, constitutional claim until the zoning authorities have had an opportunity to arrive at a final, definitive position regarding how they will apply the regulations at issue to the particular land in question. Thus, we have held that property owners' constitutional claims based upon land-use decisions were premature where the owners or tenants were denied permits by

> the initial decision-makers but did not avail themselves of available, subsequent procedures

142 F.3d at 597 (citations omitted).

Section 115-15(A) of the Thornbury Township Subdivision and Land Development Ordinance (SALDO) states:

> All preliminary and final subdivision of land development plans shall be reviewed by the Township Planning Commission and the County Planning Commission and shall be approved or disapproved by the Board in accordance with the procedures specified in this article and in other sections of this chapter. Any application not processed as required hereafter shall be null and void unless it was made prior to the adoption of these regulations.

Section 115-18 allows for the voluntary submission of a "sketch plan" to the Township Planning Commission for Review but states:

> Such sketch plan shall be considered as submitted for informal discussions only between the developer and the Planning Commission. Submission of a sketch plan does not constitute submission of an application for approval of a subdivision or land development plan. The submission of a sketch plan shall not preclude the developer from proceeding with preliminary and final plan application as required in this chapter prior to the approval of a sketch plan by the board.

Essentially, defendants argue that plaintiff's October 6, 1998 submission to the Board entitled "Application for Amended Final Plan Approval or, in the alternative, for a Zoning Map Amendment" did not constitute a "preliminary" or "final" plan, and that "[t]here is no authority for

the submission of such a document in either the Township's SALDO or the [Pennsylvania Municipalities Planning Code]." (Mun. Def.'s Br. at 16). According to defendants the October 6 submission was merely a "sketch plan" and since a formal proposal was not submitted, the Township was never afforded the opportunity to reach a final determination concerning plaintiff's request. Plaintiff responds by asserting that the Board's determination that Thornbury Noble must submit a conditional use application and a new land development plan is simply part of defendants' effort to delay plaintiff's plan in favor of the Water's project.[6]

Plaintiff's amended plan was submitted to the Board on October 6, 1998. The Board then forwarded it for review by the Chester County Planning Commission, the Thornbury Township Planning Commission and the Township Engineer. On January 13, 1999 representatives of SuperFresh appeared before the Township Planning Commission "in order to present a sketch plan, which demonstrated that Thornbury Commons would sustain a supermarket within current B Business Lands. . . ."[7] (Pl's Comp. ¶ 55). On January 19, 1999 the Board decided that "any plan submitted by Thornbury Noble to the Township shall be presented as a new application and will not be considered as an amendment to an approved final plan." (Min. of the Brd. of Sup. Mtg. 1/19/199 [sic]). As alleged in

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[6] Should I hold that the Board's determination with respect to plaintiff's amended plan was distinct from its decision to reject plaintiff's re-zoning request, plaintiff maintains that conditional use approval should not have been applied to its application.

[7] The Township Planning Commission makes recommendations to the Board, but the Board has ultimate authority.

plaintiff's complaint, in January 13, 1999 the plan under consideration was a "sketch plan." Notwithstanding this allegation, plaintiff maintains the Board's classification is ripe for adjudication and asks that I determine that its amended plan was in fact a "final" and not a "new" plan.

Plaintiff asks that I examine such details as the plan's "base engineering information, storm water management and grading." (Pl.'s Resp. to Mun. Def.'s at 23). Further, plaintiff asks that I find that its amended plan did not constitute a "shopping center" under local zoning ordinances and therefore that plaintiff should not have been required to submit a conditional use application. *Id.* at 26. Mindful of the reluctance expressed by the Court of Appeals' in *Sameric* "to allow the Courts to become super land-use boards of appeals," 142 F.3d at 598, I decline to make such determinations. However, the basis for my decision is not because the Board has been denied the opportunity to render a final decision on these matters, but because, as I have noted previously, viewing the facts in the light most favorable to plaintiff this decision is not separable from the Board's rejection of plaintiff's rezoning request. The heart of plaintiff's challenge to the Board's decision regarding its alternative, amended plan is that it was motivated by "the obvious and settled intention of the Township to frustrate [plaintiff's] efforts to secure approval for a supermarket. . . ." (Pl's Resp. to Mun. Def. at 12). In other words plaintiff alleges that the Board classified its amended complaint as a "new" application requiring a conditional use permit in order to allow the Water's project to complete the application process ahead of Thornbury Noble. It is this alleged improper motivation that forms the basis for plaintiff's § 1983 claim. Defendants would have me view their decision regarding plaintiff's

alternative amended plan as if it were completely unconnected from plaintiff's prior submissions and interactions with the Board. I decline to do so. Viewing the facts in the light most favorable to plaintiff, the Board's treatment of plaintiff's amended plan may be considered further evidence of improper motivation to be believed or dismissed by the factfinder. As I do not consider it an independent source for a separate alleged § 1983 violation it is not a proper basis for a motion for summary judgment.

To the extent that defendants still maintain that plaintiff's § 1983 claim is not ripe for adjudication, I disagree. The situation before me is similar to the issue presented to the Court of Appeals in *Blanche Road Corp. v. Bensalem Township,* 57 F.3d 253, 267-68 (3d Cir. 1995), wherein plaintiffs alleged that officers of the Township "deliberately and improperly interfered with the process by which the Township issued permits, in order to block or delay the issuance of plaintiff's permits, and . . . did so for reasons unrelated to the merits of the application. . . ." The *Blanche Road* Court characterized this type of claim as "substantively different" from those presented in most ripeness cases involving challenges to zoning decisions and held that "internal review of the individual permit decisions is thus unnecessary to render such a claim ripe." *Id.* at 268. Applying this rationale to the case before me plaintiff need not establish that it followed proper procedure in order to establish that its claim is ripe for adjudication because the basis of its suit is that this procedure was deliberately interfered with. Accordingly, defendants' motion for summary judgment on the grounds that plaintiff's claim concerning its alternative amended plan is not ripe will be denied.

C. Improper Motive

Defendants contend that even if I find that plaintiff's claim is ripe "there is insufficient evidence as a matter of law to support [p]laintiff's claim of an improper motive attributable to [d]efendants and sufficient to hold the Township liable."[8] (Mun. Def.'s Br. at 11). To establish a substantive due process claim plaintiff must prove that it was deprived of a protected property interest by arbitrary or capricious government action. *See Taylor Investment,* 983 F.2d at 1290. Such a claim may be maintained where "the government's actions were not rationally related to a legitimate government interest or were in fact motivated by bias, bad faith or improper motive." *Sameric Corp. of Delaware, Inc. v. City of Phila.,* 142 F.3d 582, 590-91 (3rd Cir. 1998) (citations and internal quotations omitted). The Court employed a similar rationale in *Bello v. Walker,* 840 F.2d 1124 (3d Cir. 1988), stating:

> We need not define, at this juncture, the outer limits of the showing necessary to demonstrate that a governmental action was arbitrary, irrational, or tainted by improper motive. The plaintiffs in this case presented evidence from which a fact finder could reasonably conclude that certain

[8] Municipal defendants' argument that plaintiff has presented insufficient evidence of an improper motive is located under subsection "b" which appears with subsection "a," concerning ripeness, under the subheading: "2. Plaintiff's Request for Approval of a Land Development Plan to Build a "Big Box" Supermarket." It is unclear whether the argument involving improper motive is meant to apply to plaintiff's request to re-zone its property or only to plaintiff's alternative request to amend the existing plan. As in my view plaintiff's claim of improper motive is not separable into two distinct decisions, I will construe defendants' argument as one contending that plaintiff has failed to allege facts sufficient to establish an improper motive.

> council members, acting in their capacity as officers of the municipality improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits. These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983. While the defendants claim that the building permit was denied because of plaintiff's failure to build in numerical sequence, thus permitting an arguable rational ground for the denial of the permit, it is the factfinders' role to resolve this factual dispute.

840 F.2d at 1129-30. *See also Woodwind Estates, Ltd. v. W.J. Gretkowski,* 205 F.3d 118, 125 (3d Cir. 2000) (reversing the grant of a Rule 50 motion because evidence presented at trial "could provide a jury with a basis from which it could reasonably find that the decision of the defendants to deny approval [for a low-income housing subdivision plan] was made in bad faith or was based upon an improper motive").

Defendants move for summary judgment on the basis that "there is no evidence . . . to suggest that the Township Board of Supervisors was motivated by economic interest with respect to [p]laintiff's property, or made payment to the Township a condition for any land use approval." (Mun. Def.'s Br. at 17). At best, according to defendants, plaintiff has presented evidence that two out of the five members of the Board "communicated the possibility of making contributions

to the Township as part of the re-zoning process." *Id.* at 18.[9] Relying on *Holt Cargo Systems, Inc. v. Delaware River Port Authority,* 20 F. Supp. 2d 803 (E.D. Pa. 1998), defendants maintain plaintiff's claim must fail.[10] I disagree.

First I note that according to the minutes of the Board's meeting on July 7, 1998, Supervisor Schmidt asked plaintiff's representative if it had any interest in "helping the township" compensate for loss of residential zoning. When plaintiff's representative stated that Thornbury Noble would do so if required by ordinance, Supervisor MacDonnell stated that these contributions have been made "voluntarily" in the past. These two statements were made in a public meeting attended by the entire Board. There is no question then that a majority of the board had knowledge of this motive. As for ratification, the other element mentioned by the *Holt* Court, in my view a reasonable juror could infer ratification from the Board's subsequent actions including: (1) the minutes of

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[9] Defendants point out that in any event these statements "were made in the context of discussions regarding rezoning the property, ***not*** land development." (Mun. Def.'s Br. at 17) (emphasis in original). This distinction is apparently made to distinguish defendants' alleged conduct from that specifically forbidden under the MPC, 53 Pa. Cons.Stat. § 10503-A, which states:

> No municipality shall have the power to require as a condition for approval of a land development or subdivision application the construction, dedication or payment of any offsite improvements or capital expenditures of any nature whatsoever or impose any contribution in lieu thereof, exaction fee, or any connection, tapping or similar fee except as may be specifically authorized by this act.

[10] The *Holt* Court stated: "In order to impute the improper motives of two individuals to the [entire] board, plaintiffs must be able to show that a majority of the board knew of the improper motive and ratified it." 20 F. Supp. 2d at 841

the Board's meeting in May 1997 indicated the Board was not receptive to Waters' plan, but multiple Board members mentioned that re-zoning might be possible if a suitable tradeoff benefitting the town could be reached; (2) Waters eventually agreed to give the Township $600,000 for the purchase of property to be kept as "open space" in return for the re-zoning it sought; (3) the town favored the Waters project over plaintiff's as evidenced by the letter dated March 24, 1998 from Supervisor Wilson wherein he stated that it was important that Waters was assured that its was the next supermarket to be built in order to make sure that the "open space" property was developed; (4) the same letter also states that Wilson would not vote for any additional commercial property to be granted to plaintiff "so [Thornbury Noble is] not likely to get Gernaurdi as a lead tenant"; (5) the testimony of Richard Dugan, director of real estate for Genaurdi's in 1998, who stated that Gernaurdi's decision not to locate a store at Thornbury Commons was due to MacDonnell's representation that the Board did not look favorably on plaintiff's request; (6) during that same conversation Dugan testified that MacDonnell suggested Dugan "look at that piece that Waters was developing"; and (7) the Board did not wait for the recommendation of the Chester County Planning Commission before denying plaintiff's requested rezoning on November 3, 1998. On November 23, 1998 the Commission recommended that plaintiff's zoning request be granted.[11]

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[11] I note that defendants submitted a substantial amount of material suggesting that the Board had legitimate reasons for taking the actions it did. For example, the individual defendants contend that the minutes from a number of Board meetings indicate that plaintiff simply failed to comply with the reasonable requests of the Board and

(Continued on following page)

As plaintiff has generated genuine issues of material fact as to whether the actions of the Board were motivated by bias or improper motive, defendants' motion for summary judgment on that basis will be denied.

D. Immunity

i. Legislative Immunity for Individual Defendants

In arguing that plaintiff has not established the violation of a fundamental property right, defendants repeatedly note that the decisions made by the Board at issue in this case were made in its "legislative capacity." Defendants cite *East Lampeter Township v. County of Lancaster,* 744 A.2d 359, 364 (Pa. Commw. Ct. 2000), which states that "[w]hen a governing body acts on a rezoning application, it acts in its legislative capacity. Indeed, section 909.1(b)(5) of the [Pennsylvania Municipalities Planning Code] expressly declares actions by a governing body on proposed amendments to land use ordinances to be legislative acts. 53 P.S. § 10909.1(b)(5)." (citations omitted).

Absolute immunity from damage claims brought under § 1983 has been extended to members of legislative bodies for actions taken in a purely legislative capacity. *See Ryan v. Burlington County, N.J.,* 889 F.2d 1286, 1290 (3d. Cir. 1989). Such immunity does not extend however to those decisions rendered while performing "administrative" functions. *See id.* The applicability of such immunity to local governmental bodies rendering zoning decisions was examined in *Acierno v. Cloutier,* 40 F.3d 597 (3d Cir.

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for this reason his requests were denied. This however represents a factual dispute properly resolved by the factfinder.

1994). In *Acierno* the Court relied on a two-part test to determine whether actions are to be considered legislative for immunity purposes: "(1) the action must be 'substantively' legislative, which requires that it involve a policy making or line-drawing decision; and (2) the action must be 'procedurally' legislative, which requires that it be undertaken through established legislative procedures." 40 F.3d at 610.[12]

The "action" challenged by plaintiff was the Board's decision to reject its re-zoning request and alternative amended plan.[13] In examining whether a decision is

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[12] Individual defendants rely on *Bass v. Attardi*, 868 F.2d 45, 50 (3d Cir. 1989) which held that "members of municipal planning boards in New Jersey are absolutely immune in their individual capacities from damage actions brought pursuant to 42 U.S.C. § 1983 alleging equal protection and first amendment violations arising out of site plan review conducted pursuant to N.J. Stat. Ann. § 40:55D-25(a)(2) (West Supp. 1988)", and *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), holding that the elimination of a city department by municipal officials was protected by legislative immunity. In *Bass* the court held that "the duties of planning board members in the state of New Jersey are so integrally related to the judicial process as to warrant shielding from liability those individuals acting in performance of them," 868 F.2d at 50 (citations omitted), and in *Bogan* the Court held that the acts of introducing, voting for, and signing an ordinance eliminating a government office was legislative act entitled to protection. 523 U.S. at 46. While both of these cases involved local government officials, neither of them examined activities similar to those engaged in by the Board in the case before me. As the *Acierno* court examined legislative immunity in the context of a § 1983 action alleging that local government officials violated a landowner's substantive due process rights through its zoning decisions, I find its reasoning more applicable.

[13] Defendants again separate these two decisions, claiming absolute legislative immunity for their rejection of plaintiff's re-zoning request and qualified immunity for their reclassification of plaintiff's amended plan. As I find these two decisions inseparably linked, I decline to make such a distinction.

substantively procedural, the *Acierno* Court stated that one factor to consider is whether the action affected a single or small number of people. The narrow target of an action has often been seen by courts as an indication of an administrative, rather than legislative, act. *See id.* at 611. Plaintiff has provided evidence that the action taken by the Board specifically targeted Thornbury Noble in order to allow the Waters project to succeed. The *Acierno* Court warned, however, that even where a decision targets only one land owner it may constitute a substantively legislative act where it involves the "enactment or amendment of zoning legislation" as opposed to "simply the enforcement of already existing zoning laws." *Id.* at 611, *quoting Jodeco, Inc. v. Hann,* 674 F. Supp. 488, 494-95 (D. N.J. 1987). If plaintiff's allegations are accepted as true the Board was improperly obstructing plaintiff's legitimate requests to proceed with its development plans. Since the Board took no affirmative action, instead simply rejecting plaintiff's re-zoning request and refusing to recognize its alternative plan as an "amended final plan," in my view its actions cannot be characterized as the "enactment or amendment of zoning legislation." Even were its actions "substantively legislative" in character, however, the Board would still not be entitled to legislative immunity because its denial of plaintiff's re-zoning request was not "procedurally legislative." *See Acierno,* 40 F.3d at 610.

Under the "procedural prong" of the *Ryan* test, the members of the Board would be "entitled to absolute legislative immunity for [their] action[s] if they followed the statutory procedures specified for such action." *Id.* at 613 (citations omitted). With respect to its denial of plaintiff's re-zoning request municipal defendants state:

> Section 155-73 of the Thornbury Township Zoning Code sets forth the procedure that the Board of Supervisors will follow with respect to amendments to the zoning ordinance. Prior to any rezoning approval, the Board of Supervisors must hold a public hearing. No such hearing occurred in the instant case. Although the Township did not issue an official denial of Plaintiff's rezoning request, it is undisputed that Plaintiff never received its requested rezoning.

(Mun. Def.'s Br. at 7). Thus defendants admit that the proper procedures were not followed in handling plaintiff's request. As the actions of the Board were neither substantively nor procedurally legislative in character, defendants are not entitled to legislative immunity for their actions.

ii. Claims Against the Individual Defendants in Their Personal Capacities

Individual defendants move for the dismissal of plaintiff's § 1983 claims against them on the grounds that they are sued in their official capacity only and are therefore legally indistinct from the municipal body on which they serve. *See Satterfield v. Borough of Schuylkill Haven,* 12 F. Supp. 2d 423, 432 (E.D. Pa. 1998) (holding that official capacity suits under § 1983 against individual council members were unnecessary where the township was already a named defendant). In support of this contention individual defendants point out that plaintiff has specifically listed them in the caption of its complaint as

sued "in their official capacity."[14] Plaintiff responds without citation that: "[t]he caption of the complaint is not determinative" and "[t]he allegations of the complaint are conclusive on this issue." (Pl.'s Resp. to Ind. Def's at 14). Plaintiff also points to the fact that I recognized in my prior opinion denying defendants' motion to dismiss that its claim for intentional interference with contractual relations can only be brought against the individuals and not against municipal subdivisions. *Thornbury Noble, Ltd. v. Thornbury Township,* No. Civ. A. 99-6460, 2000 WL 1358483 at *4 (E.D. Pa. Sept. 20, 2000). However, this provides no support for plaintiff's contention that its § 1983 claim was brought against defendants in their personal capacity.

In responding to individual defendants' contentions plaintiff states: "Thornbury Noble's claims against the Township and the individuals in their official capacity are premised upon the misconduct of the Supervisors acting in their official capacity, and even if damages were recovered only from the Township, the individuals sued in their official capacities should nonetheless remain as parties." *Id.* at 14-15. Clearly plaintiff is suing defendants for actions conducted while in their capacity as township supervisors. However, the question before me is whether

[14] The actual terminology used by individual defendants is that they should not be "found individually liable." (Ind. Def.'s Rep. Br at 14). In responding plaintiff asserts that individual defendants may be held liable in both their "individual" and "official" capacities. As pointed out in *Satterfield,* however, there is no meaningful difference in a § 1983 suit between suing an official individually or suing the agency the official works for. I assume plaintiff is in fact arguing that it has sued individual plaintiffs in their "personal" capacity. *See infra* at 23 (discussing the difference between "personal" and "official" capacity suits under § 1983).

plaintiff has brought suit against each of them personally in addition to suing them collectively as a political subdivision.

In *Hafer v. Melo,* 502 U.S. 21, 25 (1991), the Supreme Court stated:

> Personal-capacity suits . . . seek to impose individual liability upon a government officer for actions taken under color of state law. Thus, on the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. While the plaintiff in a personal-capacity suit need not establish a connection to governmental 'policy or custom,' officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law.

(citations and internal quotations omitted). The *Hafer* Court affirmed the ruling of the Third Circuit Court of Appeals which stated: "[i]t appears that Hafer understood that plaintiffs sought to sue her in her personal capacity because she raised the defense of qualified immunity throughout the course of these proceedings, a defense available only for governmental officials when they are sued in their personal, and not in their official, capacity." 912 F.2d 628, 636 (3d. Cir. 1990). I note that in the defendants' answer, filed on December 6, 2000, under the caption "Second Affirmative Defense" it states: "All claims against the individual defendants are barred by application of the doctrine of qualified immunity as articulated in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982)."

I hold that defendants had sufficient notice that they were sued in their personal capacity and will not grant their motion for summary judgment on that basis. As under *Satterfield* § 1983 claims against government agents in their official capacities are redundant where the agency is also under suit, I will dismiss plaintiff's claims against individual defendants in their official capacities.

iii. Municipal Liability Under § 1983

The individual defendants also state that "plaintiff cannot prevail unless it proves that its rights were violated by a government custom policy or practice or by an individual or body with final policy-making authority." (Ind. Def.'s Br. at 18). It is unclear whether defendants are claiming that they do not fall within the definition of a "body with final policy making authority" in general, or whether the above sentence is meant to be read in conjunction with the following paragraph asserting that a majority of a policy making body must be aware of and have ratified a decision before the actions of a minority of the members can be imputed to the entire body. To the extent that individual defendants claim they are not a body with final policy-making authority, I disagree. As defendants point out "the MPC, 53 Pa. C.S.A. § 10909.1(b)(5), grants exclusive jurisdiction to the Thornbury Township Board of Supervisors to decide whether to rezone a parcel of land within its jurisdiction." (Mun. Def.'s Br. at 7). Similarly, section 115-4 of the Thornbury Code states: "The Board shall have jurisdiction and control of all subdivision and land development within township limits." The actions of the Board in this case fall squarely within its jurisdiction. The Board is "a body with final policy making authority" for purposes of § 1983 liability.

iv. Qualified Immunity

"Government officials performing discretionary functions generally are shielded from liability for civil damages." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). This "qualified immunity" applies so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* The individual defendants assert that they are entitled to qualified immunity from suit with respect to their determination that plaintiff's amended plan constituted a "sketch" plan. Once again, in my view defendants distinction between its decision to reject plaintiff's rezoning request and its treatment of plaintiff's alternative plan is inappropriate in this case. While I am mindful of the admonition of the Court of Appeals that "there is a compelling need [to protect legislative bodies from] the severe chilling effect numerous suits for damages would have on prospective officials," *Acierno,* 40 F.3d at 615 (citations omitted), I disagree with the individual defendants' contention that they are entitled to qualified immunity for their actions.

In considering a claim of qualified immunity I must determine: (1) whether the actions of the Board violated a constitutional right; and if so, (2) whether the right was clearly established at the time plaintiff alleges the violation occurred. *See Saucier v. Katz,* 121 S. Ct. 2151, 2155-56 (2001). With respect to the first prong, plaintiff asserts a violation of its substantive due process rights. In order to succeed with this claim plaintiff must demonstrate that it was deprived of a protected property interest by a government official or body, and that those actions were either: (1) not rationally related to a legitimate governmental interest; or (2) motivated by bias, bad faith, or improper

motives. *See Parkway Garage v. City of Philadelphia,* 5 F.3d 685, 692 (3d Cir. 1993).

Defendants do not dispute that they acted as government officials and I have already determined that their actions affected a fundamental property interest of plaintiff. *See supra* at 8 § A. I have also found that there is sufficient evidence as a matter of law to support plaintiff's claim of an improper motive attributable to defendants acting as an entire body. *See supra* at 16 § C; *see also United Artists Theatre Circuit, Inc. v. The Township of Warrington,* No. Civ. A. 98-5556, 2001 WL 936638 at (*5 E.D. Pa. Aug. 15, 2001) ("plaintiff has provided evidence permitting a factfinder to conclude the Board intentionally delayed approval of plaintiff's project because it wished to receive the impact fee offered by [another developer]. If proved, the court believes the monetary motivation of the Board was improper and would constitute a violation of substantive due process.").

In *United Artists,* since the individual defendant Board members were, as here, represented by the same counsel and referred to themselves as a group the Court found it appropriate to address qualified immunity of the Board as a whole. 2001 WL 936638 at *3. However, while the Court of Appeals held that the district court Court [sic] had properly analyzed the Board members' request for qualified immunity on summary judgment, the Court remanded the case for further analysis under *Grant v. City of Pittsburgh,* 98 F.3d 116, 122 (3d Cir. 1996). In *Grant,* the Court was asked to evaluate a claim of qualified immunity raised by members of a city council. The Court stated that "crucial to the resolution of any assertion of qualified immunity is a careful examination of the record (preferably by the district court) to establish, for purposes of summary

judgment, a detailed factual description of the actions of each individual defendant (viewed in a light most favorable to the plaintiff)." 98 F.3d at 122. Under *Grant* the right the Board is alleged to have violated must not only be clearly established, but there must also be support in the record of specific official actions alleged to have violated the right. *Id.* With respect to the actions of each of the individual Board members plaintiff points to the following evidence in support [sic] his contention that they violated his substantive due process rights:

1. Defendant Wilson: Wrote a memo to the Township Manager in which he stated his desire that Waters be assured that its supermarket would be the next one built in order that the township would be able to use the money promised by Waters. This memo also stated that Wilson would not vote for any additional commercial property for Thornbury Noble so it would not be "likely to get Genaurdi as a lead tenant." Stated to Waters at a township meeting that the Board would "really have to believe that there would be a true benefit to the township for a trade off to allow this to be rezoned." Present at a June 17, 1997 meeting when Waters was informed of an absolute minimum tradeoff in return for rezoning. Present at the July 7, 1998 meeting when defendant Schmidt asked plaintiff if it was interested in making a "voluntary contribution." Present at the meetings granting Waters' requested rezoning, denying plaintiff's, and determining plaintiff's alternative plan was to be considered "new" rather than amended. Discussed the fate of Thornbury Noble's application with representatives of Genaurdi's.

2. Defendant MacDonnell: In July 1998, told a representative of Genaurdi's that plaintiff's rezoning request would be denied. Took part in discussions at a meeting concerning the Board's initial "unreceptive" response to the Waters proposal and the absolute minimum tradeoff it would take Waters to get its requested re-zoning. Was present at the meeting when a request for a contribution from Thornbury Noble was made. Advised plaintiff that such contributions had been made "voluntarily" in the past when plaintiff's representative stated that it would consider any contribution required by ordinance. Present at the meeting where Waters' request to rezone was granted and plaintiff's was denied.

3. Defendant Schmidt: Present at the initial meetings with Waters and stated that "the only way he would have any interest in [the Waters project] is for the Township to acquire a similar piece of property for open space." Was present at the meeting with Waters discussing the absolute minimum tradeoff it would take for Waters to get its requested rezoning. Asked plaintiff if it would be willing to "help[] the township with open space to compensate for loss of residential housing." Present at the meeting where Waters' request to re-zone was granted and plaintiff's was denied.

4. Defendant Lang: Present at initial meetings with Waters. Present at the meeting denying plaintiff's request to rezone. Told plaintiff's representative that its re-zoning request would not be granted unless plaintiff could convince the township there is a compelling benefit to do so. Present at the meeting

where the Board voted unanimously that plaintiff's amended plan was in fact a new plan.

5. Defendant Dewy: Present at the initial meetings with Waters including that discussing the absolute minimum tradeoff it would take Waters to get its requested re-zoning. Informed the Board what the Park & Recreation Committee had told Waters would be required as a trade off for the open space that would be consumed by the Waters project. Was present at the meeting when a request for a contribution from Thornbury Noble was made. Was present at the meeting where Waters' request to re-zone was granted and plaintiffs was denied. Present at the meeting where the Board voted unanimously that plaintiff's amended plan was in fact a new plan.

While it is my belief that defendants' claim of qualified immunity is better understood as one claimed by the Board as a whole, reviewing the record I hold that plaintiff has provided sufficient evidence of the involvement of each of the individual defendants to establish a violation of its constitutional rights under *Grant*.

The second prong of the qualified immunity analysis, requiring that the constitutional right be clearly established at the time of the alleged violation, ensures that government officials are not held liable for actions they could not reasonably have known were unlawful. *Saucier*, 121 S. Ct. at 1256-1257. At the time of the of the [sic] violation "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." *Andersen v. Creighton*, 483

U.S. 635, 636-37 (1987). Here plaintiff alleges that the Board intentionally obstructed the approval of its development plan in order to secure funds offered by another developer. The time of the alleged violation was at the earliest July 7, 1998; the date of the meeting at which plaintiff was asked to make a voluntary contribution to compensate for the loss of residential zoning. In *Blanche Road Corp.,* [sic] F.3d at 268 (3d Cir. 1995), plaintiff accused town officials of deliberately delaying the process by which the township issued zoning permits for reasons unrelated to the merits of the applications. The *Blanche Road* Court stated: "[i]f defendants, for reasons unrelated to an appropriate governmental purpose, intentionally conspired to impede the development of the . . . project, . . . such an arbitrary abuse of governmental power would clearly exceed the scope of qualified immunity." Similarly in *Bello,* 840 F.2d at 1129 (3d Cir. 1988), the Court held that the denial of a building permit designed to hinder plaintiff's building project due to personal animosity toward one of plaintiff's employees constituted a substantive due process violation. In the case before me, plaintiff alleges that defendants were motivated by a desire to secure land for the Township. In *Parkway Garage,* 5 F.3d at 695 (3d Cir. 1993), the Court held that city officials who deprived plaintiff of a fundamental property right because they wished to increase the value of the city's property violated plaintiff's substantive due process rights.

In my view the right defendants are alleged to have violated was clearly established at the time of their actions. The members of the Board should have been aware that their alleged actions were unconstitutional and they are therefore not entitled to the defense of qualified immunity. *See United Artists Theatre Circuit,* 2001 WL

936638 at *8 (holding that defendant Board of Supervisor members were not entitled to qualified immunity for decisions made in 1995, where they allegedly had impeded the final approval of a movie theater project so that the township could receive a fee from a competing developer.).

II. Intentional Interference With Prospective Contractual Relations

Also before me is the individual defendants motion for summary judgment on Count IV, which alleges that they interfered with prospective contractual relationships between Thornbury Noble and Genaurdi's and SuperFresh supermarkets. The elements of a cause of action for intentional interference with a contractual relation, whether existing or prospective, are: (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct. *See Strickland v. University of Scranton*, 700 A.2d 979, 985 (Pa. Super. Ct. 1997).

Relying on *Lindner v. Mollan*, 544 Pa. 487, 677 A.2d 1194 (Pa. 1996), the individual supervisors move for summary judgment on the grounds that since the actions alleged by plaintiff were taken in the course of their official duties they are entitled to absolute immunity as high public officials. *See Jonnet v. Bodick*, 431 Pa. 59, 244 A.2d 751, 753 (Pa. 1968) (holding that members of township boards of supervisors are considered "high public officials" under state law for purposes of absolute immunity). The

Political Subdivision Tort Claims Act, 42 Pa. C.S.A. § 8541, *et seq.*, contains various immunity provisions for municipalities and their officials. However, 42 Pa. C.S.A. § 8550 provides that there is no immunity for officials that cause injury through "a crime, actual fraud, actual malice or willful misconduct." In my prior opinion denying defendants' motion to dismiss I cited *Delate v. Kolte,* 667 A.2d 1218 (Pa. Commw. Ct. 1995), stating:

> In *Delate* . . . , the court applied that provision to a case arising from a zoning dispute and held that "the mere failure to reach the correct legal conclusion in a zoning case does not constitute the type of purposeful conduct which is necessary for a finding of willful misconduct [within the meaning of § 8550]." However, the court went on to note that in this context "willful misconduct" is synonymous with the term "intentional tort." *Id.* Therefore, individual zoning board members could be held liable if they "intentionally reached the wrong decision knowing that it was wrong, acted from corrupt motives, or engaged in any other type of conduct which would demonstrate willful misconduct." *Id.* I therefore hold that if it were confronted with the issue the Pennsylvania Supreme Court would find that the intentional interference with contractual relations alleged here constituted willful misconduct within the meaning of § 8550 and *Delate.*

Thornbury Noble, 2000 WL 1358483 at *4.

Individual Defendants appear to contend that since the *Lindner* Court held that "section 8550 of the PSTCA does not abrogate the common law doctrine of absolute privilege afforded high public officials . . ." they are absolutely immune from intentional tort claims arising out of

activity that occurred while performing their official duties. However, the *Lindner* Court's decision concerned exemption for high public officials from law suits for defamation. As the court in *Smith v. School District of Philadelphia,* 112 F. Supp. 2d 417, 426 (E.D. Pa. 2000), noted, "the Supreme Court of Pennsylvania . . . has yet to decide whether the immunity for high public officials extends to other intentional torts." Plaintiff states that the *Smith* Court then predicted that "the Supreme Court of Pennsylvania would hold that the Tort Claims Act does abrogate high public official immunity for suits for intentional infliction of emotional distress and invasion of privacy. *Id.* at 424." (Pl.'s Resp. to Ind. Def.'s at 29). This is incorrect. First, this discussion takes place on page on page [sic] 426 rather than page 424. More importantly, however, the *Smith* Court reached the opposite conclusion than that attributed to it by plaintiff. The *Smith* Court stated: "This Court predicts that the Supreme Court of Pennsylvania would hold that the Tort Claims Act does *not* abrogate high public official's absolute immunity from civil suits for intentional infliction of emotional distress and invasion of privacy." 112 F. Supp. 2d at 426 (emphasis added). The *Smith* Court based this determination on the *Lindner* Court's explanation that the Pennsylvania common law doctrine of absolute immunity for high public officials "rests upon the idea that conduct which would otherwise be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." *See Smith,* 112 F. Supp. 2d at 426 (quoting *Lindner,* 677 A.2d at 1195). High public officials, as opposed to ordinary local agency employees, "accused of defamation enjoy absolute immunity even when willful

misconduct is alleged." *Smith,* 112 F. Supp. 2d at 425. The *Smith* Court also found persuasive the *Lindner* Court's statement that "this sweeping immunity is not for the benefit of high public officials but for the benefit of the public." *Id.* As the *Smith* plaintiff's complaint alleged that the actions taken by defendants all occurred within the course of their official duties, the court held they were entitled to invoke the doctrine of absolute immunity for high public officials as a defense to plaintiff's intentional tort claims.

Plaintiff contends that the actions of the Board were outside the scope of their duties as township supervisors. According to plaintiff "[t]he Supervisors actions in interfering with the prospective contractual relations of Thornbury Noble are not within the duties prescribed by statute." (Pl.'s Resp. to Ind. Def. at 30). I agree that there is nothing in the Board members' statutory job descriptions authorizing them to commit the specific tort they are alleged to have committed; however that is not the question before me. Much of the evidence of misconduct cited by plaintiff involved casting votes, making statements, or merely being present at Board meetings. Such activity was clearly undertaken in the individual defendants' official capacities. Plaintiff points to the conversations of particular Board members with representatives of Genaurdi's advising them that the Board would not be voting for any additional property to be re-zoned at Thornbury Commons, as examples of activity undertaken outside the scope of the official duties of individual defendants. I disagree.

Simply because there is nothing in the statute defining their duties that states that supervisors are permitted to communicate to interested parties how they believe the

Board will vote does not mean that if any such communication occurs it must have taken place outside the scope of their official duties. Indeed, the subject of these conversations (how they intended to vote) concerned activity in their official capacity. Further, as I previously noted, plaintiff itself states: "Thornbury Noble's claims against the Township and the individuals in their official capacity are premised upon the misconduct of the Supervisors *acting in their official capacity*. . . ." (Pl.'s Resp. to Ind. Def's at 14-15) (emphasis added). Because such activity took place while the individual defendants were acting in furtherance of their duties as township supervisors it is "entitled to protection even at the expense of uncompensated harm to the plaintiff. . . ." *Lindner,* 677 A.2d at 1195. Construing the facts in the light most favorable to plaintiff, they do not show that the individual defendants acted for their own benefit, profited at the public's expense, spent the money at issue for any non-public purpose, or acted in any capacity other than their official one.

My review of Pennsylvania law reveals no Supreme Court precedent on whether "high public officials" are entitled to absolute immunity from civil suits for intentional interference with prospective contractual relations. In order to predict how the Supreme Court of Pennsylvania would resolve this question of unsettled state law, I should consider "relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." *Markel v. McIndoe,* 59 F.3d 463, 473 n. 11 (3d Cir. 1995). While I am mindful that my prior opinion denying defendants' motion to dismiss stated my belief that defendants could be held liable for wilful misconduct, I find the *Smith*

Court's application of the rationale employed by the Court in *Lindner* persuasive.[15] Applying that rationale to the case before me I believe that the Supreme Court of Pennsylvania would hold that absolute immunity protects high officials from civil suits for intentional interference with prospective contractual relations. Accordingly, Count IV of plaintiff's complaint will be dismissed against the individual defendants.

III. Immediate Appealability

A district court may certify an order for an interlocutory appeal if it is of the opinion that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The trial court has discretion whether to certify, however, certification is appropriate only in "exceptional" circumstances. *See Piazza v. Major League Baseball,* 836 F. Supp. 269, 270 (E.D. Pa. 1993). The Court of Appeals has held that before an order can be certified for interlocutory appeal, all three factors identified in 28 U.S.C.A. § 1292(b) must be satisfied. *See Katz v. Carte Blanche Corp.,* 496 F.2d 747, 754 (3d Cir. 1974) (finding that "the district judge must certify that the order satisfies the three criteria").

With respect to the issues in the case before me, in my view there are two controlling issues of law over which there are substantial grounds for differences of opinion: (1)

[15] I note that neither *Smith* nor *Lindner* were cited in any submission to this court prior to individual defendants' motion for summary judgment.

whether the plaintiff's allegations constitute a violation of its substantive due process rights, and (2) whether individual defendants are entitled to absolute immunity as high public officials from plaintiff's claim of prospective interference with contractual relations. *See Katz,* 496 F.2d at 755 (holding that a controlling issue of law is one that "would result in a reversal of a judgment after final hearing"). In light of my prior Orders of September 20, 2000, dismissing Count III of plaintiff's complaint in its entirety and Count IV as to municipal defendants, and November 9, 2000, dismissing Count II in its entirety, the two issues discussed above concern plaintiff's only remaining claims. I hold that an immediate appeal would materially advance the ultimate termination of this litigation and therefore the parties will be granted leave to seek an appeal pursuant to 28 U.S.C. § 1292(b).

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	CIVIL ACTION
v.	:	
THORNBURY TOWNSHIP, et al.	:	NO. 99-6460

ORDER

AND NOW, this 19 day of March, 2002, for the reasons set forth in the accompanying memorandum, it is ORDERED:

1. Plaintiff Thornbury Noble's § 1983 claims against individual defendants in their official capacities are DISMISSED.

2. Defendants Thornbury Township and Thornbury Township Board of Supervisors' motion for summary judgment is DENIED.

3. Defendants Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Jr., Charles Wilson and Robert MacDonnell's motion for summary judgment is DENIED in part and GRANTED in part.

    a. Individual defendants' motion for summary judgment on Count 1 of plaintiff's complaint is DENIED.

    b. Individual defendants' motion for summary judgment on Count IV of plaintiff's complaint is GRANTED.

4. Judgment is entered in favor of defendants Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Jr., Charles Wilson and Robert MacDonnell and against plaintiff

Thornbury Noble as to Count IV of plaintiff's complaint.

5. As this Order involves controlling issues of law as to which there are substantial grounds for differences of opinion and an immediate appeal from them may materially advance the ultimate termination of this litigation, I hereby certify this Order for immediate appeal pursuant to 28 U.S.C. § 1292(b).

/s/ TN O'Neill
THOMAS N. O'NEILL, JR., J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	CIVIL ACTION
v.	:	
THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the members of the Board of Supervisors in their personal capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MacDONNELL	:	NO. 99-6460

CIVIL JUDGMENT

Before: Honorable Thomas N. O'Neill, Jr.

AND NOW, this 21 day of October, 2003, in accordance with the Court's Memorandum and Order, dated October 21, 2003,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of defendants, Thornbury Township, Chester County; Thornbury Township Board of Supervisors; Patricia A. Dewey; J. Christopher Lang; William A. Schmidt, Jr.; Charles A.W. Wilson; and Robert A. MacDonnell; and against plaintiff, Thornbury Noble, Ltd.

BY THE COURT:

/s/ Tom O'Neill

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	CIVIL ACTION
	:	
v.	:	
THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the members of the Board of Supervisors in their personal capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MacDONNELL	:	NO. 99-6460
O'NEILL, J.		OCTOBER 21, 2003

MEMORANDUM

Plaintiff filed the present complaint in December 1999 against Thornbury Township, its Board of Supervisors and the individual members of the Board: Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Jr., Charles A.W. Wilson and Robert A. MacDonnell. After several decisions there remains only one claim pending. Plaintiff alleges that defendants violated plaintiff's substantive due process rights under the Fourteenth Amendment to the United States Constitution and states its cause of action under 42 U.S.C. § 1983. This claim is made against all of the defendants: Thornbury Township, the Board and the members of the Board in their personal capacities

In a decision filed March 20, 2002, I denied defendants' motions for summary judgment on the substantive due process claim. Defendants have renewed their motions for summary judgment in light of a recent decision by the

Court of Appeals, *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003). *United Artists* changed the standard of proof necessary to succeed on a substantive due process claim and therefore I will reconsider defendants' motions for summary judgment. Plaintiff has filed a brief in opposition to defendants' renewed motions.

BACKGROUND

This case stems from a land use decision by a municipal Board of Supervisors. A detailed factual background of this dispute is given in my earlier decision – *Thornbury Noble, Ltd. v. Thornbury Township et al.*, 2002 U.S. Dist. LEXIS 4698, at *2-8 (E.D. Pa. March 20, 2002). I will briefly summarize the relevant facts.

Plaintiff owns property situated at the intersection of routes 202 and 926 in Thornbury Township, Chester County, Pennsylvania. In 1997 plaintiff changed its development plan from one for an L-shaped building with multiple stores to a plan for a box shaped building housing one large supermarket. The box shaped building could have been built on the land then zoned for business, but access to the supermarket would have been improved if the building were moved partially onto two acres of adjacent land that were then zoned residential.

From 1997 through 1999 plaintiff attempted to convince the township Board of Supervisors and the county Planning Commission to make the zoning changes necessary to allow a box shaped supermarket with good access. Plans for Genuardi's and Superfresh supermarkets fell through while plaintiff fought for a zoning change. Meanwhile, another developer, R.J. Waters & Associates, applied for and

received the zoning changes necessary to build a supermarket at another site in the township.

Plaintiff claims that defendants intentionally approved the zoning for Waters' development more quickly than they approved the zoning for plaintiff's development because Waters agreed to make a $600,000 contribution to the township for the purchase of open space. Plaintiff alleges that defendants knew that only one supermarket would be built in the township and that it would go to the first developer to get zoning approval. The histories of both developers' applications for rezoning are detailed below.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions . . . which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party, to prevail, must make a showing sufficient to establish the existence of every element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. The nonmoving party may not simply rest

upon the allegations or denials of the party's pleading. *See id.* at 324.

On the pending motions I must determine whether any genuine issue of material fact exists. An issue is "material" only if the factual dispute "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the record taken as a whole in a light most favorable to the nonmoving party "could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). If the evidence for the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson,* 477 U.S. at 249-50 (citations omitted).

DISCUSSION

Defendants move for summary judgment based on a qualified immunity defense. In consideration of this defense I must ask: (1) has plaintiff successfully alleged a deprivation of a constitutional right; and (2) was that right clearly established at the time of the deprivation. *Lewis*, 523 U.S. at 841-42 n.5. If I answer "no" to either of these questions defendants are entitled to qualified immunity and I will grant their motions for summary judgement. *Id.* Therefore, the first issue I will discuss is whether plaintiff has alleged sufficiently a deprivation of its substantive due process rights. I answer that question in the negative. Accordingly, I do not reach the issue of whether the constitutional right was established clearly at the time of the deprivation.

Because plaintiff alleges a violation of his substantive due process rights by state actors it states a cause of action under 42 U.S.C. § 1983.[1] *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Plaintiff claims that Thornbury Township and its Board of Supervisors violated its substantive due process rights. An executive action[2] violates a person's substantive due process rights if the plaintiff can prove that: (1) that he held an interest protected by the Fourteenth Amendment's due process clause; and (2) the government's deprivation of that interest "shocks-the-conscience". *Levin v. Upper Makefield Township*, 2003 U.S. Dist. LEXIS 3213, at *15-16 (E.D. Pa. Feb. 27, 2003), summarizing law from *County of Sacramento v. Lewis*, 523 U.S. 833, 846-50 (1998) and *United Artists*, 316 F.3d at 399-401.

I have already held that plaintiff possessed a property right that is protected by the substantive due process clause of the Fourteenth Amendment and that the issue before me is ripe for adjudication. *Thornbury Noble*, 2002 U.S. Dist. LEXIS 4698, at *13-18 (property right) and *18-26 (ripeness). I must decide upon these renewed motions for summary judgment whether there is a genuine issue of

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[1] Section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ."

[2] The standard for whether an action violates a person's due process rights is different for an executive action than it is for a legislative action. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998), contrasting *Griswold v. Conn.*, 381 U.S. 479 (1965) (legislative action) with *Rochin v. Cal.*, 342 U.S. 165 (1952) (executive action).

material fact regarding whether the alleged misconduct by defendants shocks the conscience.

I. The Standard

In *United Artists* the Court of Appeals held that the shocks the conscience standard as explained in *Lewis* is to apply to land use claims made under the substantive due process clause of the Fourteenth Amendment. *United Artists*, 316 F.3d at 401. Therefore I will look directly to the Supreme Court's decision in *Lewis* for the definition of the standard.

The *Lewis* decision reviews the Supreme Court's descriptions of the shocks the conscience standard through the years. The first case to use the standard found a violation of substantive due process by executive action that "shocks the conscience" and violates the "decencies of civilized conduct." *Rochin v. California*, 342 U.S. 165, 172-73 (1952). In a later case the Court described conscience shocking action as that which is "so 'brutal' and 'offensive' that it [does] not comport with traditional ideas of fair play and decency." *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957). It has also been described as action that "interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987).

Shocks the conscience is not a precise standard. *Lewis*, 523 U.S. at 847 ("[T]he measure of what is conscience shocking is no calibrated yard stick."). It must be applied to each case independently and action that "shocks in one environment may not be so patently egregious in another." *Id.* at 850.

One of the reasons that the Court of Appeals held that the shocks the conscience standard applies in land use cases is that the Court does not want judges acting as a "zoning Board of appeals." *United Artists v. Warrington*, 316 F. Supp. at 402. Every developer who challenges an unfavorable land use Planning decision does so on the basis of local abuse of legal authority, but these are state law claims that cannot be made into section 1983 claims by the developer's use of the term "due process." *Id.*, citing *Creative Environments, Inc. v. Eastabrook*, 680 F.2d 822 (1st Cir. 1982). The Court of Appeals for the First Circuit, which the Court of Appeals cited favorably in *United Artists*, 316 F. Supp. at 402, has declared that:

> the conventional Planning dispute – at least when not tainted with fundamental procedural irregularity, racial animus, or the like – which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were Planning officials to clearly violate, much less "distort" the state scheme under which they operate.

Eastabrook, 680 F.2d at 833, quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 12 (1974).

In my March 2002 decision I analyzed the evidence available on the motion to dismiss as follows:

> plaintiffs in this case presented evidence from which a fact finder could reasonably conclude that certain council members, acting in their capacity as officers of the municipality improperly interfered with the process by which the municipality issued building permits, and that they did

> so for partisan political or personal reasons unrelated to the merits of the application for the permits. These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983.

Thornbury Noble, 2002 U.S. Dist. LEXIS 4698, at *27-28. At this time I made those statements, however, it was my understanding that plaintiff could prove its case by showing improper motive. In light of the Court of Appeals' decision in *United Artists*, however, the question before me now is whether there is sufficient evidence as a matter of law to support plaintiff's claim that defendants' actions shock the conscience.

II. The Evidence

As early as 1988, when plaintiff applied to rezone 5 acres from residential to commercial, residents of Thornbury Township voiced concerns about what would be built on plaintiff's land. Defs.' Mot. for Summ. J., ex. 4 ("They were complaining about the contamination, what they would see outside of their windows, drainage problems and many other concerns voices throughout this period."). Despite these objections the 1988 request for rezoning was granted. *Id.*, ex. 5.

Plaintiff initiated its next request for rezoning in 1997 when it was working with Genuardi's to build a supermarket on the land. *Id* ., ex.11. The rezoning was required to allow good access to a box shaped building, which is the shape of building most suited to supermarkets. At the January 20, 1998 Board of Supervisors meeting several residents objected to any rezoning. Pls.' Br. in Opp. to

Defs.' Mots. for Summ. J., ex. 4. In response to the concerns of neighbors plaintiff bought a residential property to act as a buffer between the development and residents. *Id.*, ex. 15. After plaintiff announced its purchase of the buffer property the residents present at the July 7, 1998 meeting of the Board of Supervisors expressed their preference for a supermarket over a strip mall, even if the supermarket required rezoning. *Id.*

During its consideration of the rezoning request the Board of Supervisors asked if plaintiff had "any interest in helping the township with open space to compensate for loss of residential zoning." *Id.*, ex. 15. Plaintiff's representative at the meeting replied that if there were an ordinance asking for such a contribution then plaintiff would consider making one. *Id.* The Board replied that "contributions to the Township have been made voluntarily. [Plaintiff] is asking this Board to intensify the use of the property and this Board deserves additional open space to compensate for the loss to the Township." *Id.* After that exchange the Board moved on to another topic of discussion.

At the meeting on August 4, 1998 the Board informed plaintiff that it did not favor rezoning plaintiff's property. The minutes reflect that the Board members enumerated their reasons for not favoring rezoning. The minutes list the concerns as:

- Not convinced that a single large building has an advantage over any other commercial project.
- The parcel is large enough for success, it does not have to be expanded for a viable project.

- Must be convinced that the proposal could justify commercial expansion.
- There is a plan and that is what should stand.
- The Township should not make any changes unless there is some compelling reason.
- Pursue offices for the site.

Defs.' Mot. for Summ. J., ex. 17. The Board also stated that it was "sympathetic to the residents[']' concerns." *Id.*

At the October 14, 1998 plaintiff appeared before the county Planning Commission to present two plans for its proposed development – one that did not require rezoning and one that did require rezoning. *Id.*, ex. 25. The Commission spent 75 minutes discussing the potential impact of the proposed rezoning and development. *Id.* The Commissioners asked questions about how plaintiff would prevent "commercial creep" along Route 926 and what assurances plaintiff could give that the proposed increase in impervious surface would not cause flooding problems. *Id.* Plaintiff represented that it had acquired a parcel of land that would remain zoned residential and prevent the commercial district from running further east along Route 926. *Id.* It also promised to build a detaining basin to control storm waters. *Id.* The Commission was not happy with either plan presented and suggested that plaintiff try to combining elements of the two plans into a new one that would use the land in compliance with current zoning. *Id.*

When plaintiff came back to the Board of Supervisors on November 3, 1998 it had a new development plan that incorporated some of the suggestions made at the Planning Commission meeting; however it still required

rezoning. *Id.*, ex. 26. The minutes reflect that the Board wanted to see a compelling benefit to the township before it would approve the change in zoning. *Id.* The Board noted that plaintiff's development site had already gong from 4 to 11 acres zoned commercial and that the 2 acres plaintiff was now requested to be zoned commercial was bought to provide a buffer of undeveloped space between the development and residential areas. *Id.* The minutes reflect that the Board informed plaintiff it was "not in favor of rezoning the property." *Id.*

The Planning Commission recommended in late 1998 that the Board of Supervisors rezone plaintiff's land and require additional landscaping. Pls.' Br. in Opp. to Defs.' Mots. for Summ. J., ex. 20. The Board of Supervisors never approved plaintiff's request for rezoning.

The following evidence establishes the process for rezoning of the land needed for Waters' development plan. The minutes of the May 6, 1997 Board of Supervisors meeting reported that the Board expressed reluctance to approve the rezoning required for Waters' plan. Pl.'s Br. in Opp. to Defs.' Mot. for Summ. J., ex. 9 ("The message is that the Board is not a particularly receptive audience."). The minutes also reflect that the Board told Waters that it would be more receptive to the plan if Waters gave the township open land in return. *Id.* (A Board member said "he did not see a need for another shopping center in the township and that the only way he would have any interest [in Water's plan] is for the township to acquire a similar piece of property for open space. . . ." Another said that "the Supervisors have to really believe there would be a true benefit to the township for a trade off to allow this to be rezoned.").

Waters went before the township's Parks & Recreation Committee and requested suggestions to "make the zoning change more favorable for the township." *Id.*, ex.10. The Committee recommended the purchase of 30 acres of a certain tract, which would be restored and used by the township as open space. *Id.*, ex. 11. Waters, "in lieu of saving the existing structures on the Property, and in the interest of assisting the Township in its open space acquisition efforts" offered "to make a contribution to the Township should [Waters'] zoning and land development proposals be approved, in order to assist [the Township] in the acquisition of additional Township open space." *Id.*, ex. 12 at p. 7.

The Board's decision to grant Waters' request for rezoning and land development approval notes that the project "will have a substantial impact upon the existing open space" because "[a]lmost 20 acres . . . will be hereafter lost to the Township as potentially available for open space purposes." *Id.* at p. 14. The decision acknowledges Waters' offer to give the township money towards the township's purchase of additional open space and states that "[w]e believe that this acquisition will more than offset the loss of open space and historical amenities on the Property and will provide a significant piece of open space which can be enjoyed by Township residents for generations to come." *Id.* The Order that granted Waters its zoning relief was subject to a number of "express conditions" including one that Waters was to contribute to the township $600,000 "for the express purpose of purchasing additional open space. . . ." *Id.* at 16, 21.

The Board of Supervisors approved the zoning changes requested by Waters even though the Planning Commission had recommended against their approval. By

letter of August 4, 1998 the Planning Commission "recommend[ed] that the zoning map change and zoning ordinance change not be approved because they are inconsistent with the land use policies adopted in the Township Comprehensive Plan and because of the significant affects that the proposed use would have on the local road network." *Id.*, ex. 27. The Board of Supervisors addressed these concerns in its decision to grant the changes and respectfully disagreed with the Planning Commission. *Id.*, ex. 12, p. 10. The Board found that the changes were consistent with both county and township development plans and that the Waters property was well situated for commercial development. *Id.*

In addition to the evidence regarding each development separately there is evidence that the Board favored the Waters' project over plaintiff's proposed development. In an e-mail to the solicitor and township manager the chairman of the Board said "[o]ne key issue is not having [several zoning issues] slow down the Waters' project since we want them to be able to lay the first brick to assure their supermarket will be the next one build to enable our funding for the next phase of the Dallet tract acquisition effort." *Id.*, ex. 14. The Board knew that plaintiff wanted to build a supermarket in the township. At least one Board member was of the opinion that only one supermarket would be built and that the first developer to get township approval would get the supermarket. *Id.*, ex. 28 (deposition of Charles Wilson, chairman of Board of Supervisors).

III. Analysis

A reasonable jury could conclude from this evidence that defendants intentionally hastened approval of the

Waters' project and/or intentionally slowed down approval of plaintiff's plan. The Board was not motivated by personal gain, however, but rather by a concern for the amount of open space in the township. I need not consider whether the Board acted with an improper motive. I need only decide whether their actions shock the conscience.

The executive action here is a township and its Board of Supervisors favoring one development over another for the purpose of preserving open space in the township.[3] This action was taken in the environment of local land use planning, an environment that involves many competing concerns and a good deal of politics. Plaintiff sought a zoning change for business, rather than for personal purposes. Even without the zoning changes requested Plaintiff could and in fact did build a shopping center.

I hold as a matter of law that in the land use environment and on these specific facts a township and its Board of Supervisors favoring one development over another for the purpose of preserving open space in the township does not shock the conscience. It does not "violate the decencies of civilized conduct." *See Rochin*, 342 U.S. at 172-73. It is not "so 'brutal' and 'offensive' that it [does] not comport with traditional ideas of fair play an decency." *See Breithaupt*, 352 U.S. at 435. It does not "interfere[] with rights 'implicit in the concept of ordered liberty.'" *See Salerno*, 481 U.S. at 746.

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[3] I make no finding regarding whether defendants did intentionally hasten the approval of Waters' project or intentionally slow the approval of plaintiff's development. I consider this situation for the purpose sole of deciding defendants' motions for summary judgment.

That defendant's actions shock the conscience is an essential element of a cause of action under Section 1983 for violation of a party's substantive due process rights. The evidence presented in this case, viewed in the light most favorable to plaintiff, does not create a genuine issue of material fact regarding whether defendants violated plaintiff's constitutional rights. Accordingly, defendants are entitled to qualified immunity and judgment as a matter of law.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	CIVIL ACTION
v.	:	
THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the members of the Board of Supervisors in their personal capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MacDONNELL	:	NO. 99-6460

ORDER

AND NOW, this 21 day of October, 2003, after consideration of defendants' motions for summary judgment and plaintiff's responses thereto, and for the reasons set forth in the accompanying memorandum, the defendants' motions for summary judgment are GRANTED.

/s/ T. N. O'Neill
THOMAS N. O'NEILL, JR., J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4476

THORNBURY NOBLE, LTD.

appellant

v.

THORNBURY TOWNSHIP, ET AL.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
99-6460
District Judge: Honorable Thomas N. O'Neill

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER and VAN ANTWERPEN, *Circuit Judges*

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: November 19, 2004

CH/cc: Craig A. Styer, Esq.
Mary A. Rossi, Esq.
Walter F. Kawalec III, Esq.
Andrew J. Bellwoar, Esq.

53 Pa. Stat. Ann.

§ 10101. Short title

This act shall be known and may be cited as the "Pennsylvania Municipalities Planning Code."

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§ 10501. Grant of power

The governing body of each municipality may regulate subdivisions and land development within the municipality by enacting a subdivision and land development ordinance. The ordinance shall require that all subdivision and land development plats of land situated within the municipality shall be submitted for approval to the governing body or, in lieu thereof, to a planning agency designated in the ordinance for this purpose, in which case any planning agency action shall be considered as action of the governing body. All powers granted herein to the governing body or the planning agency shall be exercised in accordance with the provisions of the subdivision and land development ordinance. In the case of any development governed by planned residential development provisions adopted pursuant to Article VII,[1] however, the applicable provisions of the subdivision and land development ordinance shall be as modified by such provisions and the procedures which shall be followed in the approval of any plat, and the rights and duties of the parties thereto shall be governed by Article VII and the provisions adopted thereunder. Provisions regulating mobilehome parks shall be set forth in separate and distinct articles of any subdivision and land development ordinance adopted pursuant to Article V[2] or any planned residential development provisions adopted pursuant to Article VII.

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[1] 53 P.S. § 10701 et seq.

[2] 53 P.S. § 10501 et seq.

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§ 10503. Contents of subdivision and land development ordinance

The subdivision and land development ordinance may include, but need not be limited to:

(1) Provisions for the submittal and processing of plats, including the charging of review fees, and specifications for such plats, including certification as to the accuracy of plats and provisions for preliminary and final approval and for processing of final approval by stages or sections of development. Such plats and surveys shall be prepared in accordance with the act of May 23, 1945 (P.L. 913, No. 367),[1] known as the "Engineer, Land Surveyor and Geologist Registration Law," except that this requirement shall not preclude the preparation of a plat in accordance with the act of January 24, 1966 (1965 P.L. 1527, No. 535),[2] known as the "Landscape Architects' Registration Law," when it is appropriate to prepare the plat using professional services as set forth in the definition of the "practice of landscape architecture" under section 2[3] of that act. Review fees may include reasonable and necessary charges by the municipality's professional consultants or engineer for review and report thereon to the municipality. Such review fees shall be based upon a schedule established by ordinance or resolution. Such review fees shall be reasonable and in accordance with the ordinary and customary charges by the municipal engineer or consultant for similar service in the community, but in no event shall the fees exceed the rate or cost charged by the engineer or consultant

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[1] 63 P.S. § 148 et seq.

[2] 63 P.S. § 901 et seq.

[3] 63 P.S. § 902.

to the municipalities when fees are not reimbursed or otherwise imposed on applicants.

(i) In the event the applicant disputes the amount of any such review fees, the applicant shall, within ten days of the billing date, notify the municipality that such fees are disputed, in which case the municipality shall not delay or disapprove a subdivision or land development application due to the applicant's request over disputed fees.

(ii) In the event that the municipality and the applicant cannot agree on the amount of review fees which are reasonable and necessary, then the applicant and the municipality shall follow the procedure for dispute resolution set forth in section 510(g),[4] provided that the professionals resolving such dispute shall be of the same profession or discipline as the consultants whose fees are being disputed.

(1.1) Provisions for the exclusion of certain land development from the definition of land development contained in section 107[5] only when such land development involves:

(i) the conversion of an existing single-family detached dwelling or single family semi-detached dwelling into not more than three residential units, unless such units are intended to be a condominium;

(ii) the addition of an accessory building, including farm buildings, on a lot or lots subordinate to an existing principal building; or

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[4] 53 P.S. § 10510(g).

[5] 53 P.S. § 107.

(iii) the addition or conversion of buildings or rides within the confines of an enterprise which would be considered an amusement park. For purposes of this subclause, an amusement park is defined as a tract or area used principally as a location for permanent amusement structures or rides. This exclusion shall not apply to newly acquired acreage by an amusement park until initial plans for the expanded area have been approved by proper authorities.

(2) Provisions for insuring that:

(i) the layout or arrangement of the subdivision or land development shall conform to the comprehensive plan and to any regulations or maps adopted in furtherance thereof;

(ii) streets in and bordering a subdivision or land development shall be coordinated, and be of such widths and grades and in such locations as deemed necessary to accommodate prospective traffic, and facilitate fire protection;

(iii) adequate easements or rights-of-way shall be provided for drainage and utilities;

(iv) reservations if any by the developer of any area designed for use as public grounds shall be suitable size and location for their designated uses; and (v) land which is subject to flooding, subsidence or underground fires either shall be made safe for the purpose for which such land is proposed to be used, or that such land shall be set aside for uses which shall not endanger life or property or further aggravate or increase the existing menace.

(3) Provisions governing the standards by which streets shall be designed, graded and improved, and walkways, curbs, gutters, street lights, fire hydrants,

water and sewage facilities and other improvements shall be installed as a condition precedent to final approval of plats in accordance with the requirements of section 509.[6] The standards shall insure that the streets be improved to such a condition that the streets are passable for vehicles which are intended to use that street: Provided, however, That no municipality shall be required to accept such streets for public dedication until the streets meet such additional standards and specifications as the municipality may require for public dedication.

(4) Provisions which take into account phased land development not intended for the immediate erection of buildings where streets, curbs, gutters, street lights, fire hydrants, water and sewage facilities and other improvements may not be possible to install as a condition precedent to final approval of plats, but will be a condition precedent to the erection of buildings on lands included in the approved plat.

(4.1) Provisions which apply uniformly throughout the municipality regulating minimum setback lines and minimum lot sizes which are based upon the availability of water and sewage, in the event the municipality has not enacted a zoning ordinance.

(5) Provisions for encouraging and promoting flexibility, economy and ingenuity in the layout and design of subdivisions and land developments, including provisions authorizing alterations in site requirements and for encouraging other practices which are in accordance with

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[6] 53 P.S. § 10509.

modern and evolving principles of site planning and development.

(6) Provisions for encouraging the use of renewable energy systems and energy-conserving building design.

(7) Provisions for soliciting reviews and reports from adjacent municipalities and other governmental agencies affected by the plans.

(8) Provisions for administering waivers or modifications to the minimum standards of the ordinance in accordance with section 512.1,[7] when the literal compliance with mandatory provisions is shown to the satisfaction of the governing body or planning agency, where applicable, to be unreasonable, to cause undue hardship, or when an alternative standard can be demonstrated to provide equal or better results.

(9) Provisions for the approval of a plat, whether preliminary or final, subject to conditions acceptable to the applicant and a procedure for the applicant's acceptance or rejection of any conditions which may be imposed, including a provision that approval of a plat shall be rescinded automatically upon the applicant's failure to accept or reject such conditions within such time limit as may be established by the governing ordinance.

(10) Provisions and standards for insuring that new developments incorporate adequate provisions for a reliable, safe and adequate water supply to support intended uses within the capacity of available resources.

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[7] 53 P.S. § 10512.1.

(11) Provisions requiring the public dedication of land suitable for the use intended; and, upon agreement with the applicant or developer, the construction of recreational facilities, the payment of fees in lieu thereof, the private reservation of the land, or a combination, for park or recreation purposes as a condition precedent to final plan approval, provided that:

(i) The provisions of this paragraph shall not apply to any plan application, whether preliminary or final, pending at the time of enactment of such provisions.

(ii) The ordinance includes definite standards for determining the proportion of a development to be dedicated and the amount of any fee to be paid in lieu thereof.

(iii) The land or fees, or combination thereof, are to be used only for the purpose of providing park or recreational facilities accessible to the development.

(iv) The governing body has a formally adopted recreation plan, and the park and recreational facilities are in accordance with definite principles and standards contained in the subdivision and land development ordinance.

(v) The amount and location of land to be dedicated or the fees to be paid shall bear a reasonable relationship to the use of the park and recreational facilities by future inhabitants of the development or subdivision.

(vi) A fee authorized under this subsection shall, upon its receipt by a municipality, be deposited in an interest-bearing account, clearly identifying the specific recreation facilities for which the fee was received.

Interest earned on such accounts shall become funds of that account. Funds from such accounts shall be expended only in properly allocable portions of the cost incurred to construct the specific recreation facilities for which the funds were collected.

(vii) Upon request of any person who paid any fee under this subsection, the municipality shall refund such fee, plus interest accumulated thereon from the date of payment, if the municipality had failed to utilize the fee paid for the purposes set forth in this section within three years from the date such fee was paid.

(viii) No municipality shall have the power to require the construction of recreational facilities or the dedication of land, or fees in lieu thereof, or private reservation except as may be provided by statute.

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§ 10503-A. Grant of power

(a) The governing body of each municipality other than a county, in accordance with the conditions and procedures set forth in this act, may enact, amend and repeal impact fee ordinances and, thereafter, may establish, at the time of municipal approval of any new development or subdivision, the amount of an impact fee for any of the offsite public transportation capital improvements authorized by this act as a condition precedent to final plat approval under the municipality's subdivision and land development ordinance. Every ordinance adopted pursuant to this act shall include, but not be limited to, provisions for the following:

(1) The conditions and standards for the determination and imposition of impact fees consistent with the provisions of this act.

(2) The agency, body or office within the municipality which shall administer the collection, disbursement and accounting of impact fees.

(3) The time, method and procedure for the payment of impact fees.

(4) The procedure for issuance of any credit against or reimbursement of impact fees which an applicant may be entitled to receive consistent with the provisions of this act.

(5) Exemptions or credits which the municipality may choose to adopt. In this regard the municipality shall have the power to:

(i) Provide a credit of up to 100% of the applicable impact fees for all new development and growth which constitutes affordable housing to low- and moderate-income persons.

(ii) Provide a credit of up to 100% of the applicable impact fees for growth which are determined by the municipality to serve an overriding public interest.

(iii) Exempt de minimus applications from impact fee requirements. If such a policy is adopted, the definition of de minimus shall be contained in the ordinance.

(b) No municipality shall have the power to require as a condition for approval of a land development or subdivision application the construction, dedication or payment of any offsite improvements or capital expenditures of any nature whatsoever or impose any contribution

in lieu thereof, exaction fee, or any connection, tapping or similar fee except as may be specifically authorized under this act.

(c) No municipality may levy an impact fee prior to the enactment of a municipal impact fee ordinance adopted in accordance with the procedures set forth in this act, except as may be specifically authorized by the provisions of this act. A transportation impact fee shall be imposed by a municipality within a service area or areas only where such fees have been determined and imposed pursuant to the standards, provisions and procedures set forth herein.

(d) Impact fees may be used for those costs incurred for improvements designated in the transportation capital improvement program which are attributable to new development, including the acquisition of land and rights-of-way; engineering, legal and planning costs; and all other costs which are directly related to road improvements within the service area or areas, including debt service. Impact fees shall not be imposed or used for costs associated with any of the following:

(1) Construction, acquisition or expansion of municipal facilities other than capital improvements identified in the transportation capital improvements plan required by this act.

(2) Repair, operation or maintenance of existing or new capital improvements.

(3) Upgrading, updating, expanding or replacing existing capital improvements to serve existing developments in order to meet stricter safety, efficiency, environmental or regulatory standards not attributable to new development.

(4) Upgrading, updating, expanding or replacing existing capital improvements to remedy deficiencies in service to existing development or fund deficiencies in existing municipal capital improvements resulting from a lack of adequate municipal funding over the years for maintenance or capital construction costs.

(5) Preparing and developing the land use assumptions, roadway sufficiency analysis and transportation capital improvement plan, except that impact fees may be used for no more than a proportionate amount of the cost of professional consultants incurred in preparing a roadway sufficiency analysis of infrastructure within a specified transportation service area, such allowable proportion to be calculated by dividing the total costs of all road improvements in the adopted transportation capital improvement program within the transportation service area attributable to projected future development within the service area, as defined in section 504-A(e)(1)(iii),[1] by the total costs of all road improvements in the adopted transportation capital improvement program within the specific transportation service area, as defined in section 504-A.

(e) Nothing in this act shall be deemed to alter or affect a municipality's existing power to require an applicant for municipal approval of any new development or subdivision from paying for the installation of onsite improvements as provided for in a municipality's subdivision and land development ordinance as authorized by this act.

(f) No municipality may delay or deny any application for building permit, certificate-of-occupancy, development or any other approval or permit required for construction,

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[1] 53 P.S. § 10901 et seq.

land development, subdivision or occupancy for the reason that any project of an approved capital improvement program has not been completed.

(g) A municipality which has enacted an impact fee ordinance on or before June 1, 1990, may for a period not to exceed one year from the effective date of this article, adopt an impact fee ordinance to conform with the standards and procedures set forth in this article. Where a fee previously imposed pursuant to an ordinance in effect on June 1, 1990, for transportation improvements authorized by this article is greater than the recalculated fee due under the newly adopted ordinance, the individual who paid the fee is entitled to a refund of the difference. If the recalculated fee is greater than the previously paid fee, there shall be no additional charge.

(h) The powers provided by this section may be exercised by two or more municipalities, other than counties, which have adopted a joint municipal comprehensive plan pursuant to Article XI[1] through a joint municipal authority, subject to the conditions and procedures set forth in this Article.

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[1] 53 P.S. § 10901 et seq.

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§ 10603. Ordinance provisions

(a) Zoning ordinances should reflect the policy goals of the statement of community development objectives required in section 606,[1] and give consideration to the character of the municipality, the needs of the citizens and

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[1] 53 P.S. § 10606.

the suitabilities and special nature of particular parts of the municipality.

(b) Zoning ordinances may permit, prohibit, regulate, restrict and determine:

(1) Uses of land, watercourses and other bodies of water.

(2) Size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures.

(3) Areas and dimensions of land and bodies of water to be occupied by uses and structures, as well as areas, courts, yards, and other open spaces and distances to be left unoccupied by uses and structures.

(4) Density of population and intensity of use.

(5) Protection and preservation of natural resources and agricultural land and activities.

(c) Zoning ordinances may contain:

(1) provisions for special exceptions and variances administered by the zoning hearing board, which provisions shall be in accordance with this act;

(2) provisions for conditional uses to be allowed or denied by the governing body pursuant to public notice and hearing and recommendations by the planning agency and pursuant to express standards and criteria set forth in the zoning ordinances. In allowing a conditional use, the governing body may attach such reasonable conditions and safeguards, other than those related to off-site transportation or road improvements, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance;

(2.1) When an application for either a special exception or a conditional use has been filed with either the zoning hearing board or governing body, as relevant, and the subject matter of such application would ultimately constitute either a "land development" as defined in section 107[2] or a "subdivision" as defined in section 107, no change or amendment of the zoning, subdivision or other governing ordinance or plans shall affect the decision on such application adversely to the applicant and the applicant shall be entitled to a decision in accordance with the provisions of the governing ordinances or plans as they stood at the time the application was duly filed. Provided, further, should such an application be approved by either the zoning hearing board or governing body, as relevant, applicant shall be entitled to proceed with the submission of either land development or subdivision plans within a period of six months or longer or as may be approved by either the zoning hearing board or the governing body following the date of such approval in accordance with the provisions of the governing ordinances or plans as they stood at the time the application was duly filed before either the zoning hearing board or governing body, as relevant. If either a land development or subdivision plan is so filed within said period, such plan shall be subject to the provisions of section 508(1) through (4),[3] and specifically to the time limitations of section 508(4) which shall commence as of the date of filing such land development of subdivision plan;

(2.2) provisions for regulating transferable development rights, on a voluntary basis, including provisions for the protection of persons acquiring the

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[2] 53 P.S. § 10107.

[3] 53 P.S. § 10508.

same, in accordance with express standards and criteria set forth in the ordinance and section 619.1;[4]

(3) provisions for the administration and enforcement of such ordinances;

(4) such other provisions as may be necessary to implement the purposes of this act;

(5) provisions to encourage innovation and to promote flexibility, economy and ingenuity in development, including subdivisions and land developments as defined in this act;

(6) provisions authorizing increases in the permissible density of population or intensity of a particular use based upon expressed standards and criteria set forth in the zoning ordinance; and

(d) Zoning ordinances may include provisions regulating the siting, density and design of residential, commercial, industrial and other developments in order to assure the availability of reliable, safe and adequate water supplies to support the intended land uses within the capacity of available water resources.

(e) Zoning ordinances may not unduly restrict the display of religious symbols on property being used for religious purposes.

(f) Zoning ordinances may not unreasonably restrict forestry activities.

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[4] 53 P.S. § 10619.1.

§ 10603.1. Interpretation of ordinance provisions

In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

ANALYSIS OF REVISIONS TO THE PENNSYLVANIA MUNICIPALITIES PLANNING CODE
(Act 247 of 1968, as amended by Act 170 of 1988)

ARTICLE V – SUBDIVISION AND LAND DEVELOPMENT

Section 501: Grant of Power.

The major change in this section is the mandatory submission to the governing body or designated planning agency of *all subdivision and land development plats* that fall within the definitions in Article I whenever a municipality enacts a subdivision and land development ordinance. This is consistent with a second major change in Article V, found in Section 503(1.1), which has the effect of requiring that a municipality follow the MPC definition of "land development" with the exceptions noted in that clause. Under prior law, a municipality could define land development as it wished provided it did not exceed the parameters of the MPC's definition. Now the MPC's definition governs with the exceptions noted in Section 503(1.1), and the processing of subdivision and land development plans is mandatory.

The reference to a PRD "*ordinance*" is also editorially amended to read PRD "*provisions*" to conform to changes made to Article VII.

Section 502: Jurisdiction of County Planning Agencies; Adoption by Reference of County Subdivision and Land Development Ordinances.

This section is divided to facilitate reading, and the general terms "municipality" and "municipalities" are used in order to provide consistency with other sections of the MPC.

Subsection (a). This subsection is editorially amended.

Subsection (b). In this subsection the time period for review of subdivision and land development applications by county planning agencies is reduced to 30 days from 45 days to expedite the plat approval process.

Subsection (c). This subsection provides that the county planning agency must concur when a municipality wishes to designate the county planning agency as its official administrative agency for review and approval of plats after adopting, by reference, the subdivision and land development ordinance of the county.

Section 503: Contents of Subdivision and Land Development Ordinance.

This section sets forth various provisions which may be included in a subdivision and land development ordinance.

Clause (1). This clause is amended to specifically give municipalities authority to charge fees for review of subdivision and land development plans and to require certification of the accuracy of plats. Review fees, based upon a schedule established by ordinance or resolution, are defined as those reasonable and necessary charges required by a municipality to compensate its professional consultants or engineers for services rendered in the review process; however, fees shall not exceed actual charges of these consultants and engineers. This clause also provides for an arbitration-type process by which applicants who dispute these fees may resolve this matter in accordance with the procedure set forth in Section 510(g).

Clause (1.1). This new clause is added to permit a local option for waiver of the broader definition of land

development provided in Section 107, in order to avoid potential hardships on those attempting to convert existing single family dwellings into three or fewer residential units (excluding condominiums); or to construct accessory buildings, including farm buildings; or the addition or conversion of buildings or rides within the confines of an amusement park.

Clause (2). This clause is not amended.

Clause (3). This clause is amended to add a cross-reference to Section 509 to reflect the more detailed provisions in that section relating to completion of improvements and guarantees.

Clause (4). This clause is amended to add language to clarify that any land development which is not immediate may be excused from requirements for installation of improvements as a condition for final plat approval.

Clause (4.1). This new clause is added to assist municipalities that have adopted a subdivision and land development ordinance but have chosen not to enact a zoning ordinance. Under this new provision, a municipality may provide for minimum lot sizes and setbacks in its subdivision and land development ordinance, if they are based on the availability of water and sewage services.

This new clause will now enable those municipalities which have not enacted a zoning ordinance to provide for uniform setback lines and minimum lot sizes. In Bd. of Supervisors of Franklin Twp. v. Meals, 57 Pa. Cmwlth. 129, 426 A.2d 1200 (1981), the Court had ruled that these regulations were invalid without enactment of a zoning ordinance. Now, a municipality without a zoning ordinance

may still provide for setbacks and minimum lot sizes, which are essentially "zoning principles."

Clause (5). This clause is amended to clarify that either the governing body or the planning agency (if authorized in the ordinance) may administer the ordinance and permit alterations in the site requirements.

Clause (6). This clause is not amended.

Clause (7). This new clause is added to encourage coordination with adjacent municipalities and other levels of government which are affected by land development plans by authorizing solicitation of reviews and reports from these municipalities and other governmental agencies.

Clause (8). This new clause is added to permit a municipality to grant waivers or modifications to minimum standards in a land development ordinance when literal compliance would be unreasonable, cause undue hardship, or when an alternative standard can be shown to provide equal or better results. The procedure for granting such waivers in Section 512.1 is cross-referenced.

Clause (9). This new clause is proposed to clarify that a municipality may impose conditions for the approval of plats whether preliminary or final. It also provides that the municipality establish a procedure for an applicant's acceptance or rejection of conditions.

This amendment is intended to delineate the authority of a municipality to impose prerequisites for subdivision and land development approvals, while equitably providing a developer the opportunity to notify the municipality of either the rejection or acceptance of the conditions. It is anticipated that a developer's rejection of the conditions

will be deemed a disapproval of the application It should be noted that a municipality must render a written decision supporting any conditions pursuant to Section 508(1) and Section 508(2) in accordance with the holding in Board of Commissioners of Annville Township v. Livengood, 44 Pa. Cmwlth. 336, 403 A.2d 1955, (1979).

Clause (10). This new clause insures that developments include provisions for reliable, safe, and adequate water supply.

Clause (11). This new clause provides specific standards and prerequisites for mandatory open space and recreation land dedication, the construction of recreational facilities, or fees in-lieu-of dedication, including a formally adopted recreation plan in accordance with definite ordinance standards.

The provisions of this clause are intended to avoid arbitrary and abusive application of such requirements by establishing basic "ground rules" which are intended to limit municipal discretion. This language was originally proposed by the Task Force, excised in the Senate, and reinstated as amended by the House Local Government Committee.

Section 503.1: Water Supply.

This section was added by amendment in the Senate Local Government Committee at the request of the Public Utility Commission (PUC). The intent is to insure that every owner of a lot within a subdivision or development shall have access to available water supply by requiring an applicant to present evidence in the form of a PUC Certificate of Public Convenience, an application therefor, an

agreement to provide water service from a bona fide cooperative association of lot owners, or a written agreement from a municipal authority or utility that such a water supply is available. If water is supplied by private wells owned and maintained by lot owners, this section does not apply.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD., Plaintiff v. THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the members of the Board of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MacDONNELL, Defendants	Civil Action No. 99-CV-6460

RENEWED MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON and ROBERT A. MacDONNELL

Defendants Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Jr., Charles Wilson and Robert MacDonnell ("Supervisors") move this court for entry of summary judgment in their favor and against the plaintiff for the reasons set forth as follows:

1. Plaintiff, Thornbury Noble, Ltd., filed a complaint on or about December 19, 1999 asserting violations of its substantive due process rights pursuant to 42 U.S.C. {s}1983 (Count I), violation of the Pennsylvania Municipalities Planning Code ("MPC") (Count II), Temporary Regulatory Taking (Count III), and the state law claim of

Intentional Interference With Contractual Relations (Count IV).

2. Defendants timely filed a motion to dismiss Plaintiff's Complaint.

3. By Order dated September 20, 2000, the Court granted Defendants' motion to dismiss Count III in its entirety, and Count IV, as to the Township and Township Board of Supervisors only. By Order dated November 9, 2000, the Court granted Defendants' motion to dismiss Count II.

4. The only remaining claims at issue were Plaintiffs claim for violations of substantive due process against the Township, the Township Board of Supervisors and the five Supervisors (Count I), and the state law claim of interference with contract against the Supervisors (Count IV).

5. Defendants filed a Motion for Summary Judgment, which was granted in part and denied in part by Order dated March 29, 2002. The Court dismissed the state law claim, but allowed the federal law claim regarding substantive due process to move forward because Plaintiff raised an issue of fact concerning "improper motives".

6. The Third Circuit Court of Appeals recently held in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 2003 WL 115585 (Jan. 14, 2003), inter alia, that a landowner may no longer base a substantive due process claim upon allegations of "improper motives".

7. The Court in *United Artists* also held that a landowner's substantive due process claim against a municipality and its officials must demonstrate that the disputed actions "shock the conscience".

8. For the following reasons, Plaintiff's claim must be dismissed as a matter of law:

A. Plaintiff's claim that Defendants' actions were based upon improper motives fails as a matter of law to demonstrate a cause of action pursuant to 42 U.S.C. {s}1983;

B. All disputed actions by Defendants are rationally related to a legitimate governmental interest and therefore cannot violate Plaintiff's substantive due process rights as a matter of law;

C. Defendants' actions do not shock the conscience as a matter of law;

D. Plaintiff's constitutional claims are not ripe for determination; and,

E. Defendants Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Jr., Charles Wilson and Robert MacDonnell are entitled to absolute and/or qualified immunity.

9. Defendants' initial Motion for Summary Judgment and in all supporting briefs, including the attached Brief, are incorporated herein by reference.

WHEREFORE, Defendants Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Jr., Charles Wilson and Robert MacDonnell respectfully request this Honorable Court to grant their Renewed Motion for Summary

Judgment and dismiss all claims against them with prejudice.

SIANA, BELLWOAR & MCANDREW, LLP

By: /s/ Andrew J. Bellwoar
Andrew J. Bellwoar, Esquire
Christopher J. Gerber, Esquire
Attorneys for Defendants
Patricia A. Dewey, J.
Christopher Lang,
William A. Schmidt, Jr.
Charles Wilson and
Robert Mac Donnell

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN
BY: John P. Gonzales, Esquire
Identification No. 71265
One Montgomery Plaza, Suite 1002
Norristown, PA 19401
(610) 292-4470

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.,	:	
vi [sic].	:	
THORNBURY TOWNSHIP, CHESTER COUNTY, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, AND THE MEMBERS OF THE BOARD OF SUPERVISORS IN THEIR OFFICIAL CAPACITY, PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MACDONNELL	:	No. 99-CV-6460

ORDER

AND NOW, this ___ day of ___, 2003, upon consideration of the Renewed Motion for Summary Judgment of Defendants, Thornbury Township and the Thornbury Township Board of Supervisors, and any response thereto, it is hereby ORDERED and DECREED that Defendants' Renewed Motion for Summary Judgment is GRANTED

and any and all claims against Moving Defendants are dismissed with prejudice.

BY THE COURT:

_____

J.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN
BY: John P. Gonzales, Esquire
Identification No. 71265
One Montgomery Plaza, Suite 1002
Norristown, PA 19401
(610) 292-4470

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.,	:	
v.	:	
THORNBURY TOWNSHIP, CHESTER COUNTY, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, AND THE MEMBERS OF THE BOARD OF SUPERVISORS IN THEIR OFFICIAL CAPACITY, PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MACDONNELL	:	No. 99-CV-6460

RENEWED MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS, THORNBURY TOWNSHIP AND THORNBURY TOWNSHIP BOARD OF SUPERVISORS

1. Plaintiff, Thornbury Noble, Ltd., filed a Complaint on or about December 19, 1999 asserting violations of its civil rights and related state law claims arising from various land-use decisions made by the Defendants concerning a property owned by the Plaintiff.

2. Moving Defendants, Thornbury Township and the Thornbury Township Board of Supervisors filed a Motion for Summary Judgment which was granted in part and denied in part by Order dated March 29, 2002. The Court denied Moving Defendants' Motion for Summary Judgment regarding Plaintiffs Substantive Due Process claim because the Court held that Plaintiff raised an issue of fact whether the land-use decisions at issue were based upon "improper motives."

3. The Third Circuit Court of Appeals, in *United Artists Theater Circuit. Inc. v. Township of Warrington,* 316 F.3d 392 (3d Cir.), *Reh'g denied,* 324 F.3d 133 (3d Cir. 2003) recently overruled prior Third Circuit precedent and held that a landowner cannot rely upon allegations of "improper motives" to support a Substantive Due Process claim. To the contrary, the Third Circuit has now established a "shocks the conscience" standard to be applied in Substantive Due Process claims.

4. Defendants resubmit this Motion for Summary Judgment in light of the Third Circuit's decision in *United Artists,* and contend that Plaintiffs Complaint and all claims against Moving Defendants should be dismissed as a matter of law.

5. Moving Defendants incorporate by reference as if same were more fully set forth herein at length, the Memorandum of Law which is attached hereto. Defendants further incorporate by reference, the Motion and Supporting Briefs filed on behalf of the individual Defendants.

WHEREFORE, Defendants, Thornbury Township and the Thornbury Township Board of Supervisors, respectfully request that this Honorable Court grant

their renewed Motion for Summary Judgment and dismiss any and all claims against Moving Defendants with prejudice.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN

BY: /s/ John P. Gonzales
JOHN P. GONZALES, ESQUIRE
Attorney for Defendants

DATE: 5/8/03

EXHIBIT 5

1989 – 5

ORDINANCE ADOPTING AN AMENDMENT TO THE ZONING MAP OF THORNBURY TOWNSHIP, CHESTER COUNTY, TO CHANGE THE ZONING CLASSIFICATION OF CERTAIN PROPERTIES AT THE SOUTHEAST CORNER OF THE INTERSECTION OF ROUTES 202 and 926 FROM "A" AGRICULTURAL AND RESIDENTIAL TO "B" BUSINESS DISTRICT, AMENDING THE SPECIAL REGULATIONS APPLICABLE TO THE "B" BUSINESS DISTRICT TO PROVIDE FOR A FIFTY FOOT BUFFER PLANTING STRIP WHERE PROPERTY WITHIN A COMMERCIAL DEVELOPMENT ABUTS A RESIDENTIAL DISTRICT, AND REPEALING INCONSISTENT PROVISIONS OF SAID REGULATIONS

IT IS HEREBY ENACTED AND ORDAINED by the Board of Supervisors of Thornbury Township, Chester County, Pennsylvania that the Zoning Map of Thornbury Township, dated December, 1983, and referred to and made part of the Zoning Ordinance of Thornbury Township, by Section 202 thereof, and the Zoning Ordinance of Thornbury Township, as both Map and Ordinance have been amended, are hereby amended in the following respects.

SECTION 1. The following described properties shall be changed in classification from the "A" Agricultural and Residential District (as described in Part 3 of the Zoning Ordinance) to the "B" Business District classification (as described in Part 4 of the Zoning Ordinance):

ALL THAT CERTAIN tract of land situate in Thornbury Township, Chester County, Pennsylvania, bounded

and described according to a plan made by GEO-Technical Services, Inc., 851 South 19th Street, Harrisburg, PA, 17104, dated April, 1989, as follows:

BEGINNING at a point in the centerline of Street Road (Route 926), distant North 69 degrees 00 minutes East, 500 feet measured along said centerline of Street Road from the intersection thereof with the centerline of the Wilmington-West Chester Turnpike, said point of beginning being the corner of the existing commercial zoning (Parcel #3) and Parcel #4; thence from said point of beginning along said centerline of Street Road to a point, North 69 degrees 00 minutes East a distance of 185.00 feet, said point being the corner of Parcel #4 and Parcel #5; thence along the centerline of Street Road and Parcel #5, the following two courses and distances: (1) North 69 degrees 00 minutes East a distance of 5.66 feet; (2) North 67 degrees 08 minutes East a distance of 53.47 feet to a point; thence on a line through Parcel #5 South 21 degrees 00 minutes East a distance of 501.74 feet to a point on the line dividing Parcel #5 and the N/L property of May Hohenberger; thence along said line South 69 degrees 00 minutes West a distance of 244.10 feet to a point, said point being the corner of Parcel #5 and Parcel #3; thence along a line dividing Parcel #5 and Parcel #3 North 21 degrees 00 minutes West a distance of 285.00 feet to a point, said point being the corner of Parcel #5 and Parcel #4; thence along the dividing line of Parcel #3 and Parcel #4, North 21 degrees 00 minutes West 215.00 feet to the point of beginning.

CONTAINING 0.913 acres in Parcel #4 and 1.890 acres of Parcel #5, the total area being 2.803 acres.

SECTION 2. The Zoning Map of Thornbury Township shall be modified by the Thornbury Township engineer to include the properties described in Section 1 hereof to establish the precise limits of the foregoing Map amendment, which modification shall be conclusive as to the extent of such Map change.

SECTION 3. Section 404.3 of the Zoning Ordinance is amended to read in its entirety as follows:

3. Along each side or rear property line which directly abuts a residence district in the Township or a similar district in an adjoining municipality, there shall be a buffer planting strip not less than fifty (50) feet in width. The buffer planting strip shall comply with the following:

   A. The buffer planting strip shall be measured from the district boundary line or from the near street line where a street serves as the district boundary line. The buffer planting strip shall not be part of a street right-of-way but shall be in addition thereto.

   B. The buffer planting strip may be included with the required side or rear yard, and in case of conflict the larger yard requirement shall apply.

   C. Within the buffer planting strip, the exterior width beyond the planting screen, as described in Section 103, shall be planted with grass seed, sod or ground cover and shall be maintained and kept clean of all debris, rubbish, weeds and tall grass (in excess of twelve (12) inches).

   D. The buffer planting strip shall be a landscaped area free of structures, materials and

vehicular parking. No driveways or streets shall be permitted in the buffer planting strip except at points of ingress and egress.

E. The Board of Supervisors may, in its sole discretion, permit all or a portion of the buffer planting strip to be located within the abutting residence district where the abutting residential property is owned or controlled by the owner of the property within the zoning district, where such abutting residential property forms part of the lot being developed for commercial purposes and where it determines that the intent of the buffer planting strip regulations will be met. In the event the Board of Supervisors permits the buffer planting strip to be so located, it shall require that appropriate perpetual easements and restrictions be placed upon that portion of the abutting residential property being used for the buffer planting strip.

SECTION 4. Section 406.9, Buffer Requirement, is hereby repealed, and Section 406.10 is redesignated Section 406.9.

ENACTED AND ORDAINED this 10th day of July 1989.

BOARD OF SUPERVISORS
THORNBURY TOWNSHIP

ATTEST:

/s/ Judith S. Mankin
Secretary

/s/ Bates, Chairman
/s/ Swinehart
/s/ John Massengale

EXHIBIT 7

ZONING

Chapter 155

From the

CODE

of the

Township
of
THORNBURY

GENERAL CODE PUBLISHERS CORP.
72 Hinchey Road
Rochester, New York 14624

July 1997

ARTICLE VII
B Business Districts

§ 155-33. B Business District established.

Business districts are intended to:

A. Provide sufficient space in appropriate locations for the types of shopping, professional and service establishments anticipated to be needed in the township.

B. Protect commercial development against intrusive uses which are incompatible and against objectionable influences such as noise or glare and from hazards of fire.

C. Provide appropriate space for the requirements of commerce, including the provision of off-street parking spaces, safe circulation of pedestrian and motor traffic in the zone and in nearby areas.

D. Promote the most desirable use of land and pattern of building development in accord with a well-considered

plan for the district as a whole and to protect the character of the area and nearby districts.

§ 155-34. Procedures.

To assure a fair and comprehensive review of applications under these sections, any owner of a tract of land within these zoning districts desiring to construct a commercial facility shall submit the following:

A. The initial application shall include a site layout, typical front and side elevations, typical floor plan, landscaping plans, as well as an engineering plan showing the proposed method of water runoff control and type of sewage treatment.

B. A schematic drawing shall be supplied indicating the areas required for loading and unloading. A statement shall accompany this which indicates the manner and frequency of use of such facilities.

§ 155-35. Permitted uses. [Amended 11-3-1998 by Ord. No. 1998-4]

A. Uses by right. A building may be erected or used and a lot may be used or occupied for any of the following purposes:

(1) Retail store.

(2) Personal service shop, including barbershop, beautician, dry cleaning, laundry, tailoring and shoe repair.

(3) Bank or other financial institution.

(4) Offices.

(5) Automobile service stations;

(6) Shop of furniture makers, cabinet makers, carpenters, upholsterers, electricians, tinsmiths, plumbers or other similar crafts.

(7) Bakeries.

(8) Restaurants.

(9) Accessory use on the same lot which may include:

(a) Storage within a completely enclosed building in conjunction with a permitted use.

(b) Parking.

(c) Signs as permitted in these regulations.

B. Conditional uses. The following uses shall be permitted as a conditional use when authorized by the Board of Supervisors in accordance with the standards and procedures set forth in § 155-82.1. for the grant of a conditional use:

(1) Shopping center development aggregating over 30,000 feet square or more of gross floor area.

§ 155-71. Expiration of special exceptions and variances. [Amended 8-12-1985 by Ord. No. 81285-A]

Unless otherwise specified by the Zoning Hearing Board, a special exception or variance which has been authorized by the Zoning Hearing Board shall expire if the applicant fails to obtain a building or use permit within six months from the date of authorization thereof or fails to commence a substantial amount of work within six months from the date of issuance of the permit for such work. Owners of properties wherein a special exception or variance has

been granted must reapply for additional relief when changes are requested beyond the original authorization.

§ 155-72. Fees.

Fees for a hearing before the Zoning Hearing Board should be paid for by the applicant in amounts established by the Board of Supervisors by resolution from time to time.[9]

ARTICLE XII
Amendments

§ 155-73. Amendment procedure.

The Board of Supervisors may amend, supplement, change, modify or repeal the regulations herein prescribed, restrictions, boundaries and other provisions of this Part I in the following manner:

A. The Board of Supervisors shall hold a public hearing upon a proposed amendment or change in this Zoning Ordinance.

B. The Board of Supervisors shall hold the public hearing after giving notice published once each week for two successive weeks in a newspaper of general circulation in the township. Such notice shall state the time and place of the hearing and the particular nature of the matter to be considered at the hearing. The first publication shall not be more than 30 days and the second publication shall not be less than seven days from the date of the hearing. All other notices and

[9] Editor's Note. Former sections 851 through 854, regarding fees for curative amendment, which immediately followed this section, were deleted at time of adoption of Code (see Ch. 1, General Provisions, Art. I).

procedures relating to amendment of zoning ordinances and maps contained in Section 609 of the Pennsylvania Municipalities Code shall be observed.[10] **[Amended 10-2-1989 by Ord. No. 1989-6]**

C. An opportunity shall be presented at such hearing for all interested parties and citizens to be heard.

§ 155-74. Hearing.

Whenever 50% or more of the owners of property in the township shall present to the Board of Supervisors a petition duly signed and acknowledged requesting an amendment, supplement, change, modification or repeal of the regulations prescribed for or of the Zoning Maps,[11] including such district or part thereof, it shall be the duty of the Board of Supervisors to hold a public hearing thereon and to cause notice thereof to be given in the manner prescribed in § 155-73.

ARTICLE XIII
Enforcement; Remedies; Administration

§ 155-75. Appointment of officers.

There shall be a Zoning Officer and an Enforcement Officer, neither of whom shall be a member of the Zoning Hearing Board, and each officer shall be appointed by the Board of Supervisors to serve for a period of one year.

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[10] Editor's Note: See 53 PS. § 10609.

[11] Editor's Note: The Zoning Map is on file in the township offices.

§ 155-76. Zoning permit.[12]

A zoning permit shall be required prior to the erection of any building. Applications for permits shall be made, in writing, to the Enforcement Officer and shall contain adequate information for such officer to ascertain whether or not the proposed building complies with the provision of this Part I. Permits shall be granted or refused, in writing, within 15 days after receipt of application and shall be valid for one year from the date of issue. Permits may be renewed annually within 15 days from the expiration thereof for additional successive periods of one year, but each such renewal permit and the issuance thereof shall be subject to the provisions of all of the applicable township ordinances and any rules, regulations and resolutions made pursuant thereto which are in effect on the date of renewal, which shall be the date of the expiration of the preceding permit. Failure to renew within the required time shall terminate all renewal privileges. Before any renewal permit shall be issued, the permittee shall pay an additional fee in an amount as set from time to time by resolution of the Board of Supervisors, and the cost of any additional inspection or other services required to be performed by the township officer prior to the issuance of such permit.

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[12] Editor's Note: Amended at time of adoption of Code (see Ch. 1, General Provisions, Art I).

EXHIBIT 8

SUBDIVISION AND LAND DEVELOPMENT

Chapter 115

from the CODE

of THORNBURY TOWNSHIP,

Chester County, Pennsylvania

General Code Publishers Corp.
72 Hinchey Road
Rochester, New York 14624

July, 1997

Chapter 115

SUBDIVISION AND LAND DEVELOPMENT

ARTICLE I
General Provisions

§ 115-1. Short title.
§ 115-2. Purpose.
§ 115-3. Control.
§ 115-4. Jurisdiction.

ARTICLE II
Terminology

§ 115-5. Word usage.
§ 115-6. Definitions.

ARTICLE III
Construal of Provisions

§ 115-7. Compliance.
§ 115-8. Approval requirements.
§ 115-9. Applicability.

ARTICLE IV
Administration

§ 115-10. Enforcement.
§ 115-11. Inspections.
§ 115-12. Fees.
§ 115-13. Restrictions.
§ 115-14. Exception.

ARTICLE V
Procedures

§ 115-15. General requirements.
§ 115-16. Plan submission.
§ 115-17. Submission to other agencies.
§ 115-18. Submission of sketch plan.
§ 115-19. Review of sketch plan.
§ 115-20. Submission of preliminary plan.
§ 115-21. Review of preliminary plan.
§ 115-22. Submission of final plan.
§ 115-23. Review of final plan.
§ 115-24. Recording of final plan.
§ 115-25. Exempted plans.
§ 115-26. Resubdivision procedure.
§ 115-27. Dedication documents.

ARTICLE VI
Plan Submission Requirements

§ 115-28. Sketch plan.
§ 115-29. Preliminary plan.
§ 115-30. Final plan.
§ 115-31. As-built plan.

ARTICLE VII
Agreements

§ 115-32. Agreement specifications.

ARTICLE VIII
Development and Design Standards

§ 115-33. Application.
§ 115-34. Land and use requirements.
§ 115-35. General standards for public streets.
§ 115-36. Partial and half streets.
§ 115-37. Street widths.
§ 115-38. Street grades.
§ 115-39. Horizontal curves.
§ 115-40. Vertical curve.
§ 115-41. Intersection.
§ 115-42. Sight distance at intersections.
§ 115-43. Restriction of access.
§ 115-44. Curbs, gutters and sidewalks.
§ 115-45. Street names and signs.
§ 115-46. Block layout.
§ 115-47. Lots and parcels.
§ 115-48. Stormwater management.
§ 115-49. Stormwater management plan.
§ 115-50. Public facilities and open space.
§ 115-51. Community assets.
§ 115-52. Utility and drainage easements.

ARTICLE IX
Improvement Construction Standards

§ 115-53. General requirements.
§ 115-54. Sanitary sewage disposal.
§ 115-55. Water distribution system.
§ 115-56. Fire hydrants.
§ 115-57. Street construction.
§ 115-58. Curbs and/or gutters.
§ 115-59. Stormwater and runoff control.
§ 115-60. Monuments.
§ 115-61. Shade trees.
§ 115-62. Street identification signs.
§ 115-63. Driveway construction within right-of-way.

ARTICLE X
Acceptance of Improvements

§ 115-64. Conditions of acceptance of streets and other improvements.
§ 115-65. Dedication of streets and other improvements.
§ 115-66. Acceptance of streets and other improvements.
§ 115-67. Dedication of sanitary sewers.
§ 115-68. Acceptance of sanitary sewers.
§ 115-69. Township responsibility to accept.
§ 115-70. Recreational facilities.

ARTICLE XI
Enforcement

§ 115-71. Amendments.
§ 115-72. Violations and penalties.
§ 115-73. Appeals.
§ 115-74. Preventive remedies.
Driveway Requirements:
Minimum Specifications

[HISTORY: Adopted by the Board of Supervisors of the Township of Thornbury as Ch. 22 of the 1983 Code. Amendments noted where applicable.]

GENERAL REFERENCES

Comprehensive Plan – See Ch. 6.
Planning Commission – See Ch. 46.
Building construction – See Ch. 60.
Numbering of buildings – See Ch. 64.
Fences, walls and screens – See Ch. 76.
Sewers – See Ch. 105.
Streets and sidewalks – See Ch. 108.
Trees – See Ch. 129.

Water – See Ch. 150.
Zoning – See Ch. 155.

ARTICLE I
General Provisions

§ 115-1. Short title.

This chapter shall be known and may be cited as the "The Thornbury Township Subdivision and Land Development Ordinance of 1983."

§ 115-2. Purpose.

The purpose of this chapter is to protect and promote safety, health and morals; to secure sites suitable for building purposes and human habitation while protecting the soils, vegetation, quality of the waters and other elements of the ecology; to accomplish a coordinated development of the township; to provide for the general welfare by guiding and protecting amenity, convenience, future governmental, economic, practical and social and cultural facilities, development and growth, as well as the improvement of governmental processes and functions; to guide uses of land and structures, type and location of streets, public grounds and other facilities; and to permit the township to minimize such problems as may presently exist or which may be foreseen.

§ 115-3. Control.

A. Subdivision control. No subdivision or resubdivision of a lot, tract or parcel of land shall be effected, and no street, sanitary sewer, storm drain, water main or other facility in connection therewith shall be laid out, constructed, opened or dedicated for public use or

travel, or for the common use of occupants of buildings abutting hereon, except in strict accordance with the provisions of this chapter.

B. Land development control. No excavating, filling or grading of the soil, and no construction, demolition or installation which directly or indirectly disturbs the soil, except in the process of gardening or farming operations, shall be effected, nor shall any structure or building, whether prefabricated, precut, preassembled, or otherwise be erected or placed on any lot, tact or parcel of land, except in strict accordance with the provisions of this chapter.

C. Sale of lots; permits; erection of buildings or on-site improvements. In a subdivision, no lot may be used or sold, no building permit may be issued and no building or other structure may be erected unless and until a plan for such subdivision shall have been approved and duly recorded, and a grading plan, including a complete conservation plan for erosion and sediment control, has been duly approved, and until either the required on-site and/or public improvements in connection therewith from the lot or building to an existing improved street, or otherwise, shall have been constructed or the township has been assured, by means of a proper completion guaranty in the form of an acceptable bond or deposit of funds or securities in escrow sufficient to cover the cost of all required public and on-site improvements, as estimated by the Township Engineer, that such public and on-site improvements will subsequently be installed by the subdivider or owner of the property. Where, owing to unusual and specific conditions, a literal enforcement of any of the provisions of this section would result in unnecessary hardship, such reasonable exceptions thereto may be made by the Township Supervisors as will not be contrary to the interests of the public or property owner involved or adjacent thereto, in which

case the issuance of a permit or erection of a building or other structure may be permitted subject to such conditions and safeguards as may be imposed to assure adequate streets and other public improvements, and adequate conservation and other on-site improvements.

§ 115-4. Jurisdiction.

The Board shall have jurisdiction and control of all subdivision and land development within township limits. To ensure that the actions of the Board in administering this chapter may be correlated with all relevant data and procedures, the Board hereby designates the Township Planning Commission as the agency of the Board for the following purposes:

A. All applications relating to either preliminary or final approval of subdivision and land development plans shall be referred, upon submission, to the Township Planning Commission.

B. All preliminary consultations by the developer relating to the plans shall be held with the Township Planning Commission.

C. The Township Planning Commission shall make recommendations to the Board concerning approval, disapproval, modification and conditions of approval of all plans. In making such recommendation, the Commission shall refer specifically to that section of this chapter or any statute or other ordinance or regulation applicable to the recommendation.

D. The Planning Commission shall make recommendations to the Board concerning the interpretation of and the granting of modifications from the provisions and standards required by this chapter.

ARTICLE II
Terminology

§ 115-5. Word usage.

Unless otherwise expressly stated, the following words and phrases shall be construed throughout this chapter to have the meanings herein indicated. The singular shall include the plural and the plural shall include the singular. Words used in the present or past tenses shall include the future tense. The words "person," "applicant," "subdivider" and "owner" shall include a corporation, unincorporated association and a partnership, or other legal entity, as well as an individual. The word "building" shall include the word "structure." The word "watercourse" shall include channel, creek, ditch, dry run, spring, stream and river. The words "shall" and "will" are always mandatory.

§ 115-6. Definitions.

As used in this chapter, except where the context clearly indicates otherwise, the following words and/or phrases have the meaning indicated below:

* * *

(2) In the event that the township and the applicant cannot agree on the amount of review fees which are reasonable and necessary, then the applicant and the township shall follow the procedure for dispute resolution set forth in Section 510(g) of the Municipalities Planning Code.[10]

(3) The applicant must promptly pay all review fee billings. Any fee billing not disputed by the

[10] **Editor's Note: See 53 P.S. § 10501(g).**

applicant within 10 days of receipt will be deemed accepted by the applicant. Failure of the applicant to pay undisputed billings within 30 days shall give the Board the authority to suspend the applicant's application until all such billings are fully paid. If at the time when the application is considered by the Board for approval there exists a billing unpaid by the applicant for a period of time in excess of 30 days from the billing date, failure of the applicant to pay the billed review fees shall be a basis for the denial of the application. [Added 6-7-1994 by Ord. No. 1994-2]

§ 115-13. Restrictions.

A. A building permit may be issued only upon approval of a preliminary plan or, in those instances where a preliminary plan is not required, approval of a final plan. In no instance may such a permit be issued until water and sewage facility permits have been issued by the authority responsible for water and sewage.

B. No lot in a subdivision may be sold unless a final plan has been approved and recorded.

§ 115-14. Exception.

Where, owing to special conditions, a literal enforcement of this chapter and/or its accompanying regulations would result in unnecessary hardship, the Board of Supervisors may make such reasonable exception thereto as will not be contrary to the public interest and will be in conformance with existing community development. In no case shall the amount of escrow and bonding be reduced from that specified elsewhere herein. A public hearing shall be conducted prior to the granting of any exception.

ARTICLE V
Procedures

§ 115-15. General requirements.

A. All preliminary and final subdivision of land development plans shall be reviewed by the Township Planning Commission and the County Planning Commission and shall be approved or disapproved by the Board in accordance with the procedures specified in this article and in other sections of this chapter. Any application not processed as required hereafter shall be null and void unless it was made prior to the adoption of these regulations.

B. All subdivision applications shall be, for the purposes of procedure, classified as either minor or major, as follows:

(1) Minor subdivision. One in which no road, public or private, is to be constructed or widened; no other improvements, including but not limited to walkways, curbs, gutters, street lights, fire hydrants, sanitary sewers, storm drainage facilities or water mains, requiring a performance bond or escrow are to be constructed; and no earthmoving activities, except those incidental to construction of a single-family dwelling on each proposed lot, will take place. No more than two minor subdivisions shall be approved over any period of time for any original tract or parcel of ground. When more than two minor subdivisions have been submitted and approved for any original parcel, each succeeding subdivision shall be submitted as a major subdivision.

(2) Major subdivision. Comprises all other subdivision and all land developments not involving subdivision.

§ 115-16. Plan submission.

Landowners submitting an application for a minor subdivision may elect to submit such an application in the form of a final plan, in which event the procedures set forth in § 115-18 and § 115-20 hereof shall not be applicable. Nothing herein contained, however, shall prevent such landowner from first submitting a sketch plan and/or a preliminary plan, for a minor subdivision, and such is encouraged. Minor and major subdivision applications shall be subject to all review procedures specified herein. All submissions must be accompanied by fees established by resolution from time to time by the Board of Supervisors. Each plan must provide for an affidavit of ownership which must be notarized on the top sheet of each plan. No reviewing agency may review the plan without the plan being stamped, initialed and dated by the Township Subdivision Coordinator, who is appointed annually by the Board of Supervisors.

§ 115-17. Submission to other agencies.

Plans showing revision levels, dates of revision and revised items shall be submitted to the following agencies by the township for review during the course of the township review process:

A. Chester County Planning Commission. One copy of preliminary and final plans shall be submitted to the Chester County Planning Commission for its review and comment.

B. Chester County Health Department. One copy of the preliminary and final plans shall be submitted to the Chester County Health Department for review of matters relating to adequacy of the site to sustain on-site water and/or sewage disposal systems.

C. Chester County Conservation District. One copy of preliminary and final plans shall be submitted to the Chester County Conservation District for review of all elements relating to drainage and abatement of soil erosion, provided that the Township Engineer does not make such a review.

D. The township will be responsible for submitting plans to the designated agencies within such time after submission to the township as township shall determine.

§ 115-18. Submission of sketch plan.

A. A sketch plan for all proposed subdivisions or development of land located within the township may, at the developer's option, be submitted to the Township Planning Commission for review, provided that all necessary fees are submitted.

B. Such sketch plan shall be considered as submitted for informal discussion only between the developer and the Planning Commission. Submission of a sketch plan does not constitute submission of an application for approval of a subdivision or land development plan. The submission of a sketch plan shall not preclude the developer from proceeding with preliminary and final plan application as required in this chapter prior to the approval of a sketch plan by the Board.

C. For informational purposes, four copies of the sketch plan shall be submitted to the Township Secretary, for distribution to the Township Engineer and the Planning Commission.

§ 115-19. Review of sketch plan.

The Township Planning Commission shall review the sketch plan and shall recommend such changes and modifications as it shall deem necessary or advisable in the public interest in accord with the Municipalities Planning Code.[11] Within 10 calendar days after such scheduled meeting review, the Secretary of the Planning Commission shall send written notice of the action of the Planning Commission to the following:

A. The Board of Supervisors.

B. The applicant.

§ 115-20. Submission of preliminary plan.

A. The preliminary plan shall conform to the most recent administrative regulations adopted by the Board of Supervisors for such purpose.

B. Copies of the preliminary plan and all required supplementary data shall be initially and officially submitted to the Secretary of the township. After the required fees have been properly paid, the Secretary shall transmit such plans to the Township Board of Supervisors, the Township Planning Commission, the Township Solicitor, the Township Parks and Recreation Commission, the Township Historic Commission, the County Planning Commission, the Township Engineer, Chester County Soil Conservation District (CCSD), Chester County Health Department and such other persons or agencies as the Board of Supervisors shall determine. **[Added 12-6-1994 by Ord. No. 1994-8]**

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[11] **Editor's Note: See 53 P.S. § 10101 et seq.**

C. Official submission of a preliminary plan to the Township Secretary shall comprise:

(1) Three copies of the Application for Review of Preliminary Subdivision or Land Development Plan.

(2) Two copies of appropriate planning module for land development.

(3) Twenty copies of the preliminary plan. **[Amended 12-6-1994 by Ord. No. 1994-8]**

(4) Twenty copies of all other required information and plans, including the conservation plan. **[Amended 12-6-1994 by Ord. No. 1994-8]**

D. Upon receipt of the above, the Township Secretary shall retain one complete submission for the Secretary's records, and shall forward one complete submission each to the reviewing commissions and agencies designated in Subsection B hereof.

§ 115-21. Review of preliminary plan.

A. Township Planning Commission.

(1) The Township Planning Commission shall, within 45 days, review the plan and the recommendations of the County Planning Commission and the Township Engineer.

(2) Within 10 days after such meeting, the Secretary of the Planning Commission shall send written notice of the action of the Planning Commission and the reasons therefor to the following:

(a) The Township Supervisors.

(b) The applicant.

B. Township Engineer. The review by the Township Engineer shall include an examination of the content of the plans to be certain that all information

required by this article is presented in the plan submitted, and the accompanying documentation and investigation of the plan to be certain that all other township ordinances and regulations are complied with and an examination of the engineering feasibility and the reasonableness of the various schemes presented for the location, alignment and grade of streets, stormwater drainage, sanitary sewers, water supply, surface water drainage facilities and easements related thereto. The Township Engineer shall confer with the developer to the extent necessary to obtain conformity of the plan with these regulations and to comment upon the matter subject to his review. The Township Engineer shall forward his comments on the plan to the Planning Commission within 10 days, along with a recommended level of escrow/bond funds to be provided by the subdivider.

C. Board of Supervisors.

(1) When a written report of a preliminary plan has been officially submitted to the Board of Supervisors by the Planning Commission, such plan shall be placed on its agenda for review and hearing.

(2) The Board of Supervisors shall review the preliminary plan and the written reports of the Township Planning Commission, the Township Engineer and the County Planning Commission and shall require or recommend such changes and modifications as it shall deem necessary or advisable in the public interest, or it may deny approval. The Board shall act upon all applications for subdivision within 90 days from the date of the next public meeting of the Planning Commission after submission by the applicant, other than the informal sketch plan. The Board shall communicate its decision, in writing, to the

applicant within 15 days of the making of such decision, and will specify the amount of escrow/ bond to be provided.

(3) The Board of Supervisors shall designate a copy of the preliminary plan as the official copy. This copy shall include all necessary corrections as required by the Board of Supervisors. It shall be retained in the township files.

§ 115-22. Submission of final plan.

A. Within 30 days after approval of the preliminary plan, a final plan and all necessary supplementary data shall be officially submitted to the Township Secretary. However, an extension of time may be granted at the option of the Board of Supervisors.

B. The final plan shall conform to the most recent administrative regulations adopted by the Board of Supervisors for such purposes.

C. The Board of Supervisors may permit submission of the final plan in sections, each covering a reasonable portion of the entire proposed development as shown on the approved preliminary plan.

D. Official submission of the final plan to the Board of Supervisors shall consist of:

(1) Three copies of the application for review of final subdivision and/or plan.

(2) Three prints of street cross-section drawings, including street profiles and finished grades.

(3) **[Amended 12-6-1994 by Ord. No. 1994-8]** Twenty prints of the final plan, including lot lines with metes and bounds showing location of permanent markers as designated below:

(a) Six black-on-white prints.

(b) One reproducible Mylar.

(c) Other prints or reproducibles as may be required.

E. The subdivider shall agree, in writing, in a form provided by the township, that he will lay out and improve roads, streets or alleys and construct all of the improvements, including necessary grading of the entire street and alley right-of-way, paving, curbs, gutters and other improvements, including sidewalks, sewers, trees, street name signs, monuments, crosswalks, fire hydrants and all other related improvements and facilities which may be required as a condition of the approval of the plan by the Board of Supervisors within the time or times therein specified.

F. The subdivider shall furnish a bond or escrow in such amount, and not less than 110% or the maximum permissible by law, of cost of improvements. Under such conditions, and in form with surety, as shall be approved by the Board of Supervisors, to guarantee the performance of the subdivider's undertaking in Subsection E above and to secure the completion of the said improvements. Such security shall be renewable annually. Upon acceptance of the said street or improvements, the subdivider shall provide a maintenance bond not exceeding 15% of the full cost of improvements under such conditions, in form and with surety as shall be approved by the Board of Supervisors to guarantee the maintenance of the streets or alleys, including grading, paving, curbs, gutters, sidewalks, street lights, street signs, sewers and crosswalks for a period of not less than 18 months by the township. In lieu of bond, the subdivider may deposit cash or securities with the township or with a bank or trust company to guarantee performance of said contract and to secure completion

of the improvements under an escrow agreement approved by the Township Solicitor and the Board of Supervisors. The escrow agent for the deposits of such cash or securities shall be designated and selected by the Board of Supervisors.[12]

G. The subdivider shall install all underground utilities before paving any streets and before sidewalks are constructed. If streets are required to be opened for construction, a permit is required, and the street restored to original street specification is a requirement.

H. The Township Secretary shall first ensure that all fees have been paid and the necessary performance bonds have been received. The Township Secretary shall then forward all final plan documentation to the Planning Commission except one copy of the application and one print of the final plan.

I. The Secretary of the township shall forward to the County Planning Commission one print of the final plan and one copy of the application for final review.

§ 115-23. Review of final plan.

A. Township Engineer. The review of the Township Engineer shall include an examination of the content of the plans to be certain that all information and data required by this article and by the Planning Commission and Board in their review of the preliminary plan are presented in the final plan as submitted. The Township Engineer shall forward his comments on the plan to the Planning Commission within 10 days.

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[12] Editor's Note: Amended at time of adoption of Code (see Ch. I, General Provisions, Art. I).

B. Township Planning Commission.

(1) The Planning Commission shall review the plan at a scheduled meeting following its receipt.

(2) Within 45 days after such meeting, the Secretary of the Planning Commission shall send written notice of the action of the Planning Commission to the following:

(a) The Board of Supervisors.

(b) The Applicant.

C. Board of Supervisors.

(1) When a written report on a final plan has been officially returned to the Board of Supervisors by the Planning Commission, such plan shall be placed on the agenda of the Board of Supervisors for review and hearing.

(2) The Board of Supervisors shall review the final plan and the written reports of the Township and County Planning Commissions and Township Engineer and shall require or recommend such changes and modifications as it shall deem necessary or advisable in the public interest.

(3) The Board of Supervisors shall approve, modify or reject the final plan within 90 days of its filing from the date of the next public meeting of the Planning Commission, and shall notify, in writing, the applicant and any persons or groups of persons requesting such notice of decision within five days of the making of its decision.

(4) The Board of Supervisors shall designate one print and one Mylar of the final plan as the official copy. This copy shall include all corrections required by the Board of Supervisors. It shall be retained in the township files.

(5) Copies of the final plan as finally approved, with the appropriate endorsement of the Board of Supervisors and the Township Engineer, shall be distributed as follows:

(a) Three prints to the subdivider.

(6) At-time-of-signing procedure.

(a) Status of report sheet for subdivision completed.

(b) Agreement for appropriate escrow funds between developer and Township Solicitor.

(c) Township must pass resolution approving subdivision.

(d) Original signatures on two Mylars and eight copies of:

[1] The Board of Supervisors.

[2] The Chairman of Planning Commission.

[3] The Township Engineer.

§ 115-24. Recording of final plan.

A. After completion of these procedures, all endorsements, including the endorsement of the Township Engineer, shall be indicated on the record plan and on as many other copies of the final plan as may be desired.

B. The record plan shall be a clear and legible reproducible tracing on linen or dimensionally stable film.

C. After endorsement by the township, the developer shall file the record plan with the County Recorder of Deeds within 30 days of the date of final approval by the township. If the developer fails to record the final plan within such period, the action of the township shall be null and void, unless an extension of time is

granted, in writing, by the township upon written request by the developer. If the plan is approved by the township with

* * *

B. In making any alterations, the following shall be observed:

(1) No lot or tract of land shall be created that is smaller than the minimum dimensions required by Chapter 155, Zoning.

(2) Easements reserved for drainage shall not be changed.

(3) No lot shall be created which does not abut a street.

(4) The character of the area shall be maintained.

(5) The above shall not restrict a property owner from purchasing additional contiguous land, provided that it is recorded on the plan that a buildable lot is not intended.

C. In every case, the applicant shall file an application with fee and prepare a record plan and submit said plan for the endorsements of the Township Engineer and the Board of Supervisors identifying the previous record plan and shall record the revised plan.

§ 115-27. Dedication documents.

A. Prior to the dedication of road rights-of-way, sewer easements and open spaces, the developer shall submit the following documents to the Township Secretary:

(1) One reproducible tracing and two prints of the plan with all changes "as-built" incorporated on the drawing.

(2) Two prints of all road profiles, utility and conservation plans with all changes "as-built" incorporated on the drawings.

(3) One copy of the deed of dedication.

(4) One copy of the maintenance bond for a period of two years.

(5) One copy of a certificate of search or title company report to satisfy the Township Solicitor that no liens exist against the property, for taxes or otherwise.

(6) One copy of any deed restrictions or protective covenants as may be imposed or recorded upon the property as a condition of sale.

B. Processing. The Township Engineer shall review the "as-built" plan, the deed of dedication and maintenance bond, and shall make recommendation to the Supervisors.

ARTICLE VI
Plan Submission Requirements

§ 115-28. Sketch plan.

When a sketch plan is submitted in accordance with § 115-18, it shall contain the following data:

A. Tract boundaries, accurately labeled.

B. A location map showing where the development is located.

C. The name of the township, county and state.

D. North point.

E. Written or graphic scales.

F. Significant topographical (five-foot) contour intervals and physical features; stream and floodplain location.

G. Existing and proposed general street and lot layout.

H. The date and name of the developer and subdivision.

I. In the case of a land development plan, the proposed location of all buildings, parking compounds and other planned features.

J. The proposed method of water supply and sewage disposal.

K. Soil types.

L. Zoning applicable to the tract.

M. Stormwater and erosion control measures to be taken to prevent damage to adjacent and downstream properties.

§ 115-29. Preliminary plan. [Amended 12-6-1994 by Ord. No. 1994-8]

A. The preliminary plan of a proposed development shall be clearly and legibly drawn to a scale of not less than one inch equals 100 feet. One copy of the plan shall be filed which shall be reduced to a scale of one inch equals 400 feet. The preliminary plan shall contain all of the information required in this subsection upon penalty of being refused for filing.

B. The original drawing, and all submitted prints thereof, shall be made on sheets no larger than 30 inches by 42 inches. If the preliminary plan requires more than one sheet, a key diagram showing relative location of the several sections shall be drawn on each sheet.

C. The preliminary plan shall show:

(1) The name or any other identifying title of the proposed subdivision and of the township, county and state.

(2) The North point, graphic scale, written scale and date, including the month, day and year that the original drawing was completed, the month, day and year that the original drawing was revised, for each revision, and a clear and concise description and location of the changes made in each revision.

(3) The name of the record owner (and developer).

(4) The name and address of the registered engineer, surveyor or land planner responsible for the plan.

(5) The names of the owners of all adjacent properties and the deed book and page number where recorded.

(6) A key map, for the purpose of locating the property being subdivided, drawn at a scale of not less than one inch equals 2,000 feet and showing the relation of the property, differentiated by tone or pattern, to adjoining property and to all streets, roads, municipal boundaries, and to recorded subdivision plans existing within 1,000 feet of any part of the property.

(7) Tract boundaries of the property being developed, showing bearings and distances, and a statement of total acreage of the property.

(8) The names and locations of all existing sewer lines, water lines, fire hydrants, utility transmission lines, culverts, bridges, railroads, easements, rights-of-way and other significant manmade features within the proposed subdivision and within 50 feet from the boundaries of the proposed subdivision.

(9) All existing buildings and other structures.

(10) All existing streets, including streets of record (recorded, but not constructed), on or abutting the tract, including names, right-of-way widths, cartway (pavement) widths and approximate grades.

(11) Site analysis plan. The site analysis plan provides the basis for determining maximum allowed gross density per the requirements of Chapter 155, Zoning, § 155-12. The plan may be submitted on a single sheet if all required information can be clearly shown. For projects that are too complex or too large for the required information to be clearly shown on a single sheet, additional sheets may be required. The plan shall be subject to the approval of the Township Engineer and shall include the following information:

(a) Slope information clearly identifying all areas of moderate slope and steep slope and calculating the square footage of each such area. Areas of moderate slope and steep slope shall be identified on the plan through shading or similar technique that clearly identifies and distinguishes between these two slope categories.

[1] Slope analysis shall include contour lines at vertical intervals of not more than two feet.

[2] Slope shall be measured as the vertical distance (rise) divided by the horizontal distance (run). Slope shall be determined through the use of aerial photographic interpretation or actual field survey. The USGS topographic quadrangle maps shall not be recognized as an acceptable source of information for

this determination. Location and elevation of the datum used shall be a known established bench mark.

(b) Soil types and their boundaries. For any tract that contains hydric soils, a full wetlands analysis [as described in Subsection C(11)(c), below] shall be required.

(c) Wetland analysis. When required [per Subsection C(11)(b), above], a full wetland analysis shall be submitted to include:

[1] A delineation and area measurement of all lakes and ponds.

[2] A full wetland report conducted by a qualified wetland biologist or others of demonstrated qualifications. Such a person shall certify that the methods used correctly reflect technical concepts currently used and accepted by the U.S. Army Corps of Engineers, including identification and analysis of wetland vegetation, hydric soils and/or hydrologic indicators. The wetland report shall include a determination of whether wetlands are present on-site and a full delineation, area measurement (in square feet) and description of any wetlands determined to be present. The wetland definition and analysis methodology accepted by the U.S. Army Corps of Engineers shall be used. The study must be approved by the Board of Supervisors on the recommendation of the Township Engineer.

(d) Floodplain limits (based on § 155-43C in Chapter 155, Zoning) and a calculation of the square footage of floodplain area.

(e) Natural watercourses, ponds and swales.

(f) The limits of all woodlands and significant trees shall be identified. Woodland areas and significant trees that will be disturbed shall be identified. The percentage of woodland areas that will be disturbed shall be identified. Significant trees proposed to be removed shall be identified and the percentage of the total number of significant trees on the site that will be removed shall be indicated.

(g) Areas of moderate slope proposed to be disturbed shall be identified. The percentage of the entire portion of the tract containing moderate slope represented by this disturbance shall be indicated.

(h) Calculation used to determine permitted gross density per Chapter 155, Zoning, § 155-111, for any tract containing any protected areas (as defined in § 115-6). Such calculation shall include:

[1] Total areas of all existing and proposed road rights-of-way and utility rights-of-way.

[2] Calculation of base site area (as defined in § 115-6).

[3] Protected area calculation. Indicate the area of each category of protected area that occurs on the site and the total area of all protected areas for the site.

[4] Indicate the percentage of the base site area represented by the total protected area.

[5] Indicate the appropriate development factor based on the sliding scale table in Chapter 155, Zoning, § 155-111B.

[6] Indicate the maximum allowable density by showing the calculation required per Chapter 155, Zoning, § 155-111C.

(i) All documented and/or known historic or archaeological resources.

* * *

(6) A grading plan shall be included showing all proposed alterations of the natural grade, whether by cut or by fill, exceeding two feet, together with reasons for such alterations. Amounts of cut and fill shall be identified. Existing site contours and final site contours shall be shown. To assure that all fill material used contains no hazardous materials, sources and types of materials used for fills shall be identified. To assure that excavated material is disposed of properly, the location of any off-site deposit of excess material shall be identified.

(7) Preliminary designs are required for any bridges or culverts which may be necessary. Such designs shall meet all applicable requirements of the Department of Environmental Resources and/or the Pennsylvania Department of Transportation and shall be subject to the approval of the Township Engineer.

§ 115-30. Final plan.

A. The final plan of a proposed subdivision shall be clearly and legibly drawn to a scale of not less than one inch equals 100 feet.

B. The original drawing, and all submitted prints thereof, shall be made on sheets not larger than 30 inches by 42 inches. If the final plan requires more than one sheet, a key diagram showing the relative location of the several sections shall be drawn on each sheet.

C. The final plan shall include:

(1) The name or any other identifying title of the proposed subdivision and of the township, county and state.

(2) North point, graphic scale, written scale and date, including the month, day and year that the original drawing of the final plan was completed, the month, day and year that the original drawing was revised, for each revision, and a clear and concise description and location of the changes made in each revision.

(3) The name of the record owner (and developer) of the tract, and the source(s) of title to the land being developed, as shown by the records of the County Recorder of Deeds.

(4) The name, address, license number and seal of the registered professional engineer or surveyor responsible for the plan.

(5) The names of all abutting subdivisions, if any, with book and page numbers, where recorded, and the names of the owners of all adjacent unplotted land, if any, and the book and page number where recorded.

(6) A key map, for the purpose of locating the property being subdivided, drawn at a scale of not less than one inch equals 2,000 feet and showing the relation of the property, differentiated by tone or pattern, to adjoining property and to all streets, roads, municipal boundaries and

recorded subdivision plans existing within 1,000 feet of any part of the property. In addition, the approximate distance to the nearest street shall be shown, and a title, scale and North point shall be indicated.

(7) The total tract boundary lines of the area being developed with accurate distances to hundredths of a foot and bearings to ¼ of a minute. These boundaries shall be balanced and closed with an error of closure not to exceed one foot in 10,000 feet; provided, however, that the boundary(ies) adjoining additional unplotted land of the subdivider (for example, between separately submitted final plan sections) are not required to be based upon field survey, and may be calculated. The monuments shall be indicated, along with a statement of the total area of the property being developed. In addition, the Engineer or surveyor shall certify to the accuracy of the survey, the drawn plan and the placement of the monuments.

(8) The name (or number) and cartway width and lines of all existing public streets and the name and location of all other roads within the property.

(9) The following data for the cartway edges (curblines) and right-of-way lines of all recorded (except those which are to be vacated) and/or proposed streets, and for the right-of-way lines of all existing streets, within the property:

(a) The length (in feet and hundredths of a foot), of all straight lines and of the radius and the arc (or chord) of all curved lines (including curved lot lines); and

(b) The width (in feet) of the cartway, right-of-way and of the ultimate right-of-way, and (in

degrees, minutes and quarters of a minute) of the delta angle of all curved lines, including curved lot lines.

(10) All straight lot lines and chords and radii of curved lot lines, defined (in feet and hundredths of a foot) by distances, and (in degrees, minutes and quarters of a minute) either by magnetic bearings or by angles of deflection from other lot and street lines.

(11) Lot numbers and a statement of the total number of lots (and parcels).

(12) A statement of the intended use of all nonresidential lots. A statement of restrictions of any type which exist or will exist as covenants in the deed(s) for all lots contained wholly or in part in the development and, if covenants are recorded, including the deed book and page number.

(13) The proposed building reserve (setback) line for each lot, or the proposed placement of each building and, where applicable, location of on-site sewage and water facilities.

(14) The location of all existing and proposed monuments.

(15) All easement or rights-of-way where provided for or owned by public services or any other party who has secured them and any limitations on such easement or rights-of-way. Rights-of-way shall be shown and accurately identified on the plan, and easements shall either be shown or specifically described on the plan. Utility easements should be located in cooperation with the appropriate public utility companies.

(16) Location, size and invert elevation of all sanitary and storm sewers and location of all manholes,

inlets and culverts (these data may be submitted as a separate plan).

(17) If the development proposes a new street intersection with a state legislative route, the Pennsylvania Department of Transportation intersection permit number(s) shall be indicated for all such intersections.

(18) A certification of ownership, acknowledgment of plan and offer to dedicate shall be lettered on the plan and shall be duly acknowledged and signed by the owner(s) of the property and notarized.

(19) A certificate requesting approval of the plan by the Township Supervisors, Township Engineer and by the Township Planning Commission shall be presented.

(20) A reasonable space shall be left along the lower edge of the sheet, in order that the Recorder of Deeds may acknowledge receipt and recording of the plan when it is presented.

D. The final plan shall be accompanied by the following supplementary data:

(1) Typical street cross-section drawing(s) for all proposed streets. Cross-section drawings may be shown either on the final plan or on the profile sheets.

(2) Profile sheets for all proposed streets within the tract.

(a) Such profiles shall show at least the following information, properly labeled:

[1] Existing (natural) profile along both the center line of each street and at each right-of-way line.

[2] Proposed finished grade of the center line, or proposed finished grade at the top of both curbs, or proposed finished grade at both cartway (pavement) edges.

[3] The length of all vertical curves.

[4] Existing and proposed sanitary sewer mains and manholes.

[5] Existing and proposed storm sewer facilities and drainage improvements.

(b) The profile sheets shall be legibly drawn at one of the following sets of scales:

[1] One inch equals 40 feet horizontal, and one inch equals four feet vertical; or

[2] One inch equals 50 feet horizontal, and one inch equals five feet vertical.

(3) All offers of dedication, and covenants governing the reservation and maintenance of undedicated open space, shall bear the certificate of approval of the Township Solicitor as to their legal sufficiency.

(4) Such private deed restrictions, including building setback lines, as may be imposed upon the property as a condition to sale, together with a statement of any restrictions previously imposed which may affect the title to the land being developed.

(5) Documentation of approval of the Chester County Department of Emergency Services. **[Amended 12-6-1994 by Ord. No. 1994-8]**

§ 115-31. As-built plan.[14]

The as-built plan and profile sheet shall be drawn at the same scale as the final plan and profile sheets certified to by the developer of record and approved by the Township Engineer. The as-built plan shall be filed along with the offer to dedicate the roads of the development or applicable phase thereof. The same shall indicate the actual location, dimensions and/or elevations of all completed improvements, including but not limited to:

A. Concrete monuments and iron pins.

B. Cartway edges or top of curbs for both sides of each street.

C. Sanitary sewer main, manholes and laterals.

D. Storm sewers, mains, manholes, inlets, culverts, impoundment basins, ponds, water retention and let-down systems.

E. Water lines and fire hydrants.

F. Street lights, where applicable.

G. Electrical and all other underground utilities.

H. Permanent sedimentation control structures or basins.

I. Landscaping and planting material.

J. All easements.

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[14] Editor's Note: Section 603, Conservation Plan, which immediately preceded this section, was deleted 12-6-1994 by Ord. No. 1994-8.

ARTICLE VII
Agreements

§ 115-32. Agreement specifications.

Every application for final approval shall be accompanied by a form of agreement to be approved by the Township Solicitor before it shall be executed by the Board of Supervisors and filed of record. The agreement shall specify the following, where applicable:

A. That the owner agrees that he will lay out and construct all roads, streets, lanes or alleys, together with all other improvements, including grading, paving, curbs, gutters, sidewalks, street lights, fire hydrants, water mains, street signs, shade trees, storm and sanitary sewers, landscaping, traffic control devices, open space and restriction areas, erosion and sediment control measures in accordance with the final plan as approved, where any or all of these improvements are required as conditions of approval, and that he shall complete these improvements within the time or times specified by the Board of Supervisors.

B. That the owner guarantees completion of all improvements ready for dedication to the township within 24 months of final plan approval or such other time as specified by the Board of Supervisors by means of a bond or deposit of funds or securities in escrow in the

* * *

EXHIBIT 9

Ordinance 1993-8 – Automatic Protection Devices

Mr. Wilson presented for consideration an ordinance with the following caption:

ORDINANCE 1993-8

AN ORDINANCE DESCRIBING AUTOMATIC PROTECTION DEVICES PERMITTED IN THORNBURY TOWNSHIP, CHESTER COUNTY, PENNSYLVANIA, AND RESTRICTING THEIR USE.

Mr. Adams explained that the ordinance had been done in conjunction with Westtown and East Goshen Townships to make the standards the same for all three townships to ease the police in their enforcement. Mr. MacDonnell moved and Mrs. Gowen seconded a motion to adopt the ordinance as presented. The motion was carried unanimously.

Announcement

Mr. Wilson announced that the special meeting called for December 9th concerning the re-zoning of the Penn Oaks Country Club had been cancelled. The Township Secretary is to reset the date after consulting with all parties.

Commons of Thornbury – Final Plan Signing

The final plans for the shopping center at the Commons of Thornbury was presented to the Board for signature. Mrs. Gowen moved and Mr. MacDonnell seconded a motion that the plans are not to be released until all conditions are met and outstanding fees are paid. The

Board granted the applicant's request for a 60-day extension in which to met the conditions. The motion was carried unanimously.

The meeting was adjourned at 8:55 P.M.

Respectfully submitted,

Judith S. Mankin
Township Secretary

/jsm

Announcement

Mrs. Gowen announced that the Board of Supervisors would be having a public meeting on July 19, 1994 to consider the adoption of an ordinance required in conjunction with the loan from the Delaware Valley Regional Funding Authority ("DVRFA") for the Township's road improvement plans. Mr. Adams has reviewed the paperwork and sent his letter of approval to the DVRFA.

(Mr. Wilson arrived at 7:45 P.M.)

Commons of Thornbury – Recordation Extension Request

A letter was reviewed from William Schwartz, the attorney for Commons of Thornbury, in which he requested an additional 60-day extension of time to have the final plans recorded and asked that the conditions of approval be amended for the shared driveway with Robert Eichman. After discussing both matters with Mr. Eichman and Mr. Adams, Mr. Lang moved and Mrs. Gowen seconded a motion to grant a 60-day extension in which to

have the plans recorded. The motion included the notation that the Township expected the applicant to comply with all original conditions of approval, including the paving of the complete driveway, and that the Board expected the applicant to apply the binder course to the driveway within the three week period specified in Mr. Schwartz' letter dated July 5, 1994. The motion was carried unanimously. A letter is to be sent to Mr. Schwartz and the applicant, with a copy to Mr. Eichman, notifying them of the Board's decision.

Resolution 1994-6 – Open Space Grant Application

Mr. Tom Comitta presented the final draft of the Township's Open Space Grant Application for funds from Chester County. The application included a resolution by the Board of Supervisors stating their approval of the application. After thoroughly discussing the application, Mrs. Gowen moved and Mr. Schmidt seconded a motion to approve the resolution as presented by Mr. Comitta. The motion was carried unanimously.

Letters of support from the Township's Planning and Park & Recreation Commissions will be attached to the application. Mr. Comitta will prepare a concept plan to be submitted with the application. It was decided that no Township Building would be planned for this location. It is just to be used as parkland and recreation areas.

[LOGO]

THORNBURY TOWNSHIP
P.O. BOX 30
WESTTOWN, PA 19395

MINUTES OF
BOARD OF SUPERVISORS MEETING

JANUARY 17, 1995

The Special meeting of the Thornbury Township, Chester County Board of Supervisors was called to order at 7:30 P.M. by Vice Chairman, J. Christopher Lang, at the Township Building at 754 Cheyney-Thornton Road, Cheyney, PA.

Present: J. Christopher Lang, Vice Chairman
Robert MacDonnell, Supervisor
William S. Schmidt, Supervisor
John Hall, Township Solicitor
Albert Giannantonio, Township Engineer
David Linahan, Township Engineer
Mahlon Rossiter, Township Manager
Judith S. Mankin, Township Secretary

Introduction of New Township Engineer

Mr. Lang introduced Albert Giannantonio and David Linahan who will be representing the new Township Engineering firm of Yerkes Associates, Inc. Mr. Giannantonio gave a brief synopsis of his firm and how it will interact with Thornbury Township.

Police Report

Lt. John Dumond, of the Westtown-East Goshen Police Department, gave the Police Report for the month of

December. He noted that it had been a light month for activity for Thornbury with the exception of a shooting that had occurred in Birmingham Township with the victim ending up in Thornbury. Lt. Dumond noted that WEGO is in the process of interviewing for part-time officers to fill in when the full-time officers are absent.

Mr. Lang asked Lt. Dumond to submit a report showing total coverage of Thornbury for 1994 and for the total WEGO coverage in 1994. Lt. Dumond said he would do so.

Commons of Thornbury

Mr. Ray Acciavatti met with the Board of Supervisors to update them on the status of his development. He noted that DER has granted final approval of the on-site system and he is in the process of lining up tenants for the shopping center. He expects to record the final plans within a few weeks and hopes to break ground in March or April of this year. The tenants are hoping to be in business in time for the 1995 holiday season.

Thornbury Properties – Act 537 Plan

Mr. Lang reported that the Township had received a letter from Thornbury Properties' attorney, Mary Ann Rossi, granting an extension of time for the Board of Supervisors' decision on their Act 537 Plan submittal. The new date is set for February 7, 1995.

Mr. Hall reported that he and Mr. Adams had had a telephone conference with Mrs. Rossi who stated that the required Phase I Archeological Study had just been completed and would be forwarded directly to the Township. He reported that the applicant has been advised of the

Planning Commission and Township Engineer's concerns with regard to the submittal. Mrs. Rossi understood their concerns and will work with the Township Solicitor to prepare a draft agreement for the operation, maintenance and ownership of the sewer system in time for the February 7th meeting.

Upon questioning from the Board, Mr. Hall noted that the Phase I Study evaluation had been done by the PA Historical and Museum Commission and Township input is minimal. The Township Engineer can determine for the Township if the Study is complete. Mr. Linahan noted that the final determination of whether the application is complete is done by the Board of Supervisors who then determines when the 60-day review clock starts. He noted that, up to this point, the applicant has apparently been determining the 60-day clock. As the Department of Environmental Resources ("DER") stated in its meeting with Mr. Hall and him this morning, "The 60-day time clock will start when all of the Township's questions have been answered satisfactorily."

Mr. Linahan noted that the Planning Commission and the Board of Supervisors can ask questions about the historical aspect of the submittal. He also felt the completed application should then be made available for the 30-day review period, not the 30-day period that the applicant has already conducted. Mr. Giannantonio noted that both the Township's Historical Preservation Commission and Mr. Stevenson, of the Planning Commission, might wish to review the completed document and submit comments to the Board. Mr. Lang noted that the Board might wish to consider having a professional consultant review the document if the questions and comments are extensive.

A letter will be sent to the applicant stating the Township's position regarding the 60-day time clock and the items missing from the Act 537 submittal.

Greens of Penn Oaks – Act 537 Plan Review

Mr. Ray Iacobucci, applicant for the subdivision/land development of the Penn Oaks Country Club, and his attorney, Fronefield Crawford, met with the Board to discuss the status of the project. Mr. Iacobucci stated that he felt the Township should be moving this matter along "as all the major issues had been decided during the zoning hearing."

Mr. Lang noted that the Township Engineer would make the determination as to whether the Act 537 plan was complete so the 60-day clock could start. He also noted that the landscaping plan does not match the engineering plans, he requested a drawing of the six-unit building and also noted that the architectural plans do not match the site plan and grading shown.

Mrs. Iacovelli questioned whether the single family unit should be included in the subdivision/land development plans for the Country Club as the Planning Commission had been under the impression that the Board had asked the applicant not to include it. Mr. Crawford stated that the single family unit will be made a separation subdivision/land development application which could run concurrently with the townhouse application.

Mr. Crawford noted that he would be willing to work with the Township to develop an agreement between the Township and the applicant for the Act 537 plan and to who would be permittee or co-permittee. He also noted

that the 70 townhouses would be on a community system which would be designed so that the clubhouse could be added in the future if necessary. Public water will be investigated for the clubhouse and the single family unit.

Mr. Linahan stated that he had reviewed the plan very quickly and his major concern was that the Township was not listed as permittee or co-permittee. He concurs with DER that the Township should be involved in the project, even though the applicant does not want to have the Township listed. He had recommendations as to the style and long term operation of the system and would discuss the matter with the applicant's engineer. One suggestion was for a sand infiltration system which would eliminate all but one seepage bed. The drain fields will be under the ownership of the Penn Oaks Country Club and this should be set out in the agreement.

Open Space Purchase

Mr. Giannantonio reported that he had reviewed the Township's proposed plan for the Jones tract and also the Jones' suggestion that access to the property be from S. Westbourne Road. Mr. Giannantonio noted that the proposed road and bridge would cross over 400 feet of flood plan and wetlands. The area accepts drainage for 10,250 acres above Route 926. Any bridge built would have to exceed the bridge currently over 926. He estimated the cost to be in excess of $300,000 plus another $25-30,000 for engineering and application fee to DER.

Mr. Giannantonio felt the best access would be from 926 through the Post Office/Market area. He will investigate the possibility of amending PennDOT's permit for the entranceway.

Mrs. Dewey reported that the Park & Recreation Commission had recommended that the tract be purchased for passive open space not for active use as proposed by the Supervisors.

Solicitor's Permit Application

An application to sell furniture door-to-door was reviewed and discussed. The matter was turned over the Township Solicitor for opinion to the Zoning Officer.

Public Comment

Mr. Mortenson and Mr. Ball, from Thornbury Estates, were in attendance to ask the Board for assistance in having the Festers clean up their property, including the junk yard and double parking of vehicles in the right-of-way. It was noted that the Township's Zoning Officer had sent them a letter of violation but they had refused to accept it. It was agreed that the Zoning Officer should contact the Westtown-East Goshen Police for escort so the notice could be delivered personally.

Act 537 Submission Discussion

Mr. Linahan distributed copies of Chester County Procedures for Components 2, 3 and 4 for Act 537 Plan amendment. The breakdown showed the process by which the application would progress to DER. Upon submittal to the Township, it is forwarded to the Chester County Planning Commission and Health Departments, Township Planning Commission and Township Engineer for review and comments. The County agencies would have 60 days to comment. After all questions are answered to the

Township's satisfaction, the complete component would be held for 30 days' public review. If not complete, it would be returned to the applicant. Following review and municipal approval, the required resolution and transmittal letter would be sent to CCHD for forwarding to DER. Der has 60 days for review of residential developments during which time it may raise questions. If the application does not address the long-term operation of the system, DER will reject it.

Mr. Linahan noted that a final agreement is not necessary for approval by the Township, just an outline of what is proposed. The Township can require a signed agreement before signing off on the application.

He noted that DER requests that the municipalities serve as either permittee or co-permittee of the applications. If violations occur, DER would consider the Township as permittee anyway.

The Township Engineer and Solicitor will meet to draft an outline of what the Township should be expecting in any agreement to amend the Act 537 plan for the Township. They will also work on developing agreements for the two Act 537 plans currently before the Township.

Mr. Linahan also noted that the Act 537 plan submitted for Thornbury Properties' PRD was done haphazardly. It shows 50 foot setbacks for the spray fields when DER normally requires 200 feet. He also questioned the adequacy of the proposed 20-day storage pond. DER is more concerned about setbacks across existing property rather than new owners. He felt Thornbury Properties should be notified that until an agreement is signed, the application will not be considered complete by the Township. Approval

will not be given until complete and 30-day public review has taken place.

Bill Approval

Mr. Schmidt moved and Mr. MacDonnell moved to approve payment of the list of bills presented. The motion was carried unanimously.

The meeting was adjourned at 10:30 P.M.

Respectfully submitted,

Judith S. Mankin
Township Secretary

/jsm

[LOGO]

THORNBURY TOWNSHIP

P.O. BOX 30
WESTTOWN, PA 19395

MINUTES OF
BOARD OF SUPERVISORS MEETING

FEBRUARY 7, 1995

The regular monthly meeting of the Thornbury Township, Chester County Board of Supervisors was called to order at 7:30 P.M. by Chairman Charles A. W. Wilson at the Township Building at 758 Cheyney-Thornton Road, Cheyney, PA.

Present: Charles A. W. Wilson, Chairman
J. Christopher Lang, Vice Chairman
Paula Gowen, Supervisor
William Schmidt, Supervisor
Mahlon Rossiter, Township Manager
Judith S. Mankin, Township Secretary

Minute Approval – Minutes of December 6 and 20, 1994 and January 3 and 17, 1995

Mr. Schmidt moved and Mr. Lang seconded a motion to approve the minutes of the meetings of December 6 and 20, 1994 and January 3 and 17, 1995 as presented. The motion was carried unanimously.

Commons of Thornbury – Extension Request

Mr. Richard Acciavatti was in attendance to request that the Board of Supervisors release the final approved plans for the Commons of Thornbury so he could have them recorded in order to start leasing the project. Mr. Giannantonio's letter dated February 7, 1995 outlining his suggested requirements for establishing a security bond for the improvements of the project, was reviewed and discussed by the Board. Mr. Acciavatti felt the request was too stringent but noted he would comply. He stated that his attorney would be in contact with the Township Solicitor and Engineer to settle the matter.

Mrs. Gowen moved and Mr. Schmidt seconded a motion to grant a further extension of time until March 10, 1995 for Mr. Acciavatti to comply with the conditions of approval so the plans can be released for recordation. The motion was carried unanimously.

EXHIBIT 10

[LOGO]
GENUARDI'S
FAMILY MARKETS

December 5, 1997

[EXECUTED LETTER 12/5/97]

Mr. John G. Acciavatti, President
Noble Enterprises, Inc.
PO Box 179
Westtown, PA 19395-00179

Dear John:

We have reviewed your revised proposal of November 17 and have made the changes that you notated and are marked with an asterisk:

I. Site: The Commons at Thornbury, Thornbury Township, Chester County, PA.

II. Lessor: Thornbury Noble, Ltd.

III. Lessee: Genuardi Super Markets, Inc.

IV. Store Size: Approximately 50,000 [55,000] square feet

*V. Use: Sale of food, food products, pharmacy, other general merchandise and other services, or any other lawful use.

*VI. Primary Term: Twenty (20) years

*VII. Options: One (1) 5-year and one (1) 4-year. Should Lessor desire more options and should those additional options trigger a PA taxable event, then Lessor shall be solely responsible for such tax.

VIII. CAM, Taxes, Insurance: Tenant to pay a pro-rata share of CAM, real estate taxes and insurance.

IX. Exclusive: Lessor shall provide an exclusive use covenant for Lessee's use as a food store; however,

Lessor shall not be required to grant an exclusive use for the sale of prescription drugs or banking services.

X. Rent Commencement Date: Rent shall commence the earlier of:

a) 120 days after Substantial Completion of (i) Lessor's construction work and (ii) Lessee's leasehold improvements, or

b) the first day the Lessee is open for business to the public.

Lessee shall, during the aforesaid 120-day period, fixture and merchandize the store. During this time, Lessee shall be responsible for all utilities and security.

XI. Lessor's Work: Lessor shall construct a "turnkey" facility in accordance with plans and specifications generated by the Lessee. For the purpose of this proposal, it is assumed that Lessee's facility will have a total cost to the Lessor of $65 PSF. Lessee shall prepare, at its sole expense, all architectural, engineering, and construction documents for its store. Lessor shall obtain all permits and approvals at its sole expense. Lessor shall, at its sole expense, construct the balance of the shopping center and complete all required site work and be responsible for coordination of Lessee's architectural plans with its work.

*XII.

Base Rent	Annually	Monthly	Per Sq Ft
Years 1-5	725,000	60,416.67	14.50
Years 6-10	750,000	62,500.00	15.00
Years 11-15	800,000	66,666.66	16.00
Years 16-20	875,000	72,916.67	17.50
1st Option	950,000	79,166.67	19.00
2nd Option	1,025,000	85,416.67	20.50

XIII. Operating Covenant: Lessee shall open for business in fulfillment of the Use clause. Thereafter, Lessee shall have the right to cease operations at any time. In that event, Lessor shall be provided with a right to recapture the premises.

XIV. Assignment/Sublease: Lessee shall have the right to assign or sublet all or part of the demised premises for any lawful business use with Lessor's consent, which will not be unreasonably withheld; or any license or sublease that is integral to Lessee's business without Lessor's consent.

XV. Site Plan: It is agreed that Lessee and Lessor will attempt a zoning and plan change to locate the building at the Berdich property line within twelve (12) months during which time the legal/ engineering expenses will be shared equally between Lessee and Lessor not to exceed $50,000.00 by either party. In the event that this plan is not approved, Lessee will proceed with the building located approximately 200' west of the Berdich line.

XVI. Parking: Lessor will provide a minimum of five (5) parking spaces per thousand square feet of leaseable area for the entire shopping center.

XVII. Pylon Sign: As part of Lessor's work, a pylon sign shall be constructed for the shopping center. Lessee shall have the right to occupy the pylon sign along with other tenants of the shopping center. Positioning on the pylon shall be in order of the size of their premises, and each occupant's sign shall be in proportion to the size of their premises. Lessee shall pay the cost of its sign panel only.

XVIII. Facade and Sign Package: Lessee's facade shall be provided by Lessee as part of its plans and specification documents and will be in accordance with its prototype building. Lessee's building

signage shall conform with the Township ordinance and shall be furnished and installed by Lessee.

XIV [sic]. Commission: The parties will warrant to each other that no real estate commission is due to any broker as a result of this transaction.

This letter represents a non-binding proposal for the leasing of the premises herein described. No contract shall exist until a formal lease is executed and delivered by both parties. The submission of these proposed terms for consideration does not constitute a reservation of space or an option to lease the premises and the parties hereto may discontinue moving forward with the lease at any time, whereupon they shall have no rights against the other.

If you are in agreement with the above terms, please sign below and return one copy of this letter to me.

Sincerely,

/s/ Richard Dugan
Richard Dugan
Director of Real Estate

RD:dc

APPROVED: /s/ John G. Acciavatti DATE: 12/5/97
John G. Acciavatti, President

EXHIBIT 11

THORNBURY TOWNSHIP, CHESTER COUNTY BOARD OF SUPERVISORS MEETING DECEMBER 16, 1997

In attendance were Supervisors Charles A. Wilson (Chairman), Christopher Lang (Vice Chairman), Patricia Dewey and Robert MacDonnell; Robert Adams (Solicitor), Ronald Miller, Robert Eichman and John Stevenson (Planning Commission PC), D.J. Tindall and Helene MacLaughlin (Park & Recreation) and Mahlon Rossiter (Township Manager).

Mr. Wilson led the Pledge of Allegiance and called the meeting to order at 7:35 P.M.

Police Report

Chief Dumond reported that calls for November in the township were extremely low. The Chief extended an invitation to attend the police luncheon on 12/19/97 at the Westtown Township Building.

Minutes

A motion was made seconded (RM/PD) and carried to approve the December 2, 1997 minutes.

Township Park Plans

Thomas Comitta displayed the park plans. Since last viewed in May there have been many major updates through 11/18/97. The Project Manual is not complete because the Prevailing Minimum Wage expired. Mr. Comitta is waiting a new rate from L&1. The hexagonal

pavilion originally proposed has been changed. A custom designed pavilion will be built. Mr. Lang and Mr. Stevenson have been asked to do a technical review of the new pavilion. Mr. Comitta cited the following time table: (1) The plans go to the County 12/22/97 (2) Advertise for bid 1/05/98 (3) Pre-bid conference 1/21/98 at 1:00 P.M. at the Post Office (4) Bid opening 2/03/98 (5) Select a contractor by 3/04/98 (6) Target completion on 9/25/98. The grant expires 12/21/98. There was discussion on the location of the pavilion, the turtle mound and the play apparatus. Mr. Lang recommended improvements to the bridge. As suggested by Mr. Stevenson, the Board asked Mr. Comitta to give a copy of the park site plan to Louis Termini to help the restaurant and park plans coincide.

Commons at Thornbury (CT)

Present were Richard Acciavatti (Owner), Ken Kynett (Attorney) and Skip Genuardi (Developer) to determine the feasibility of building a supermarket at Route 202 and Route 926.

Mr. Kynett displayed a "concept" plan of the site showing the existing structures and proposed supermarket. Mr. Acciavatti commented that the existing open foundations will be filled in, the appearance along Route 202 will be redone and there is public water. Mr. Kynett noted that the vacant home, east of the property and owned by Mr. Acciavatti is zoned residential. CT is asking to rezone the parcel to commercial to provide better for traffic circulation. CT is looking for reaction and input from the Supervisors. The market would be between 50/55,000 s.f. Mr. MacDonnell expressed concern on expanding the commercial zoning. Mr. MacDonell recommended keeping the

market on the current commercial property. Mr. Adams asked Mr. Acciavatti if any additional stores are proposed on the south side. Before the Board considers any zoning relief the township wants to see the build-out. Mr. Adams questioned if Mr. Acciavatti is preserving the area to the south for future use. Mr. Lang told Mr. Acciavatti that everything has to be put on the table now. CT noted that good circulation through the site is important for the success of the project. Mr. Adams asked the applicant to create a plan on what has been discussed demonstrating realistic assumptions. Mr. Lang requested an aerial photograph reflecting the properties surrounding TC. Mr. Wilson recommended that the applicant tie into public sewer. Mr. Lang noted the residents of Thornbury Estates would be able to connect if a lateral main was constructed. Mr. Miller asked at what point is the PC going to be involved with this plan. Mr. MacDonnell responded that the Supervisors control the zoning in the township and the rezoning issue must be decided before going forward to the PC.

Act 537 Revision

Mr. Wilson reported that Mrs. Dewey, Mr. Rossiter and David Linahan of Yerkes Associates (YA) met with Department of Environmental Protection (DEP) on 12/15/97. Jay Stack and Del Shelton of K. Hovnanian (HOV) and Mary Ann Rossi, Esq. were also present at the meeting. HOV's project can be completed and the spray fields can be deferred. DEP was cooperative and positive. The plant can be completed with 100% stream discharge while an alternative discharge method is evaluated. Mr. Linahan will research drip irrigation. At the DEP meeting, Mrs. Rossi stated that HOV paid to design the current system and

any expense incurred to redesign it should be at the township's cost. Mr. Lang responded that HOV may benefit by not installing the spray fields and the township should look to them to pay for their fair share. Mr. Linahan will do analysis and has no idea at this stage on the cost of a drip system. Mr. Miller asked if HOV has checked into a "rapid infiltration basin.

Emergency Operations Plan (EOP)

Mr. Eichman stated that for first time in 6 or 7 years the township will be in compliance with the County, State and Federal government regarding an EOP. Mr. Wilson suggested a training meeting for the individuals named in the EOP to review manual procedures. Mr. Eichman reported that he reviewed Cheyney University's (CU) Emergency Manual and they did an excellent job. Mr. Rossiter informed the Board that there will be a meeting in mid January with Carl Williams of (CU) regarding their plan. Mr. Rossiter told the Supervisors that CU has the facilities for mass care and good coordination with CU will make the township's job easier. Mr. Lang requested Mrs. Dulin to summarize the EOP for the Board.

1998 Budget – Mr. Stevenson asked if the PC was going to receive funds to do a Comprehensive Plan. Mr. Rossiter replied the money has been budgeted for the study. Mr. Wilson recommended an early year joint meeting with the PC and Supervisors. Mr. Wilson stated there are variables that could happen during 1998 and the budget might have to be amended. A motion was made, seconded (CL/RM) and carried to adopt the 1998 budget by approving Resolution 1997-12 with a mil rate of .76.

West Chester United Soccer Club (WCUSC)

The township received a site plan from Dan Kennedy, President of WCUSC. Mr. Miller thought that a representative from WCUSC should attend the township meetings during the review process. Mrs. Dewey recommended that WCUSC connect to public water if feasible. If WCUSC's only use for water is the concession stand, okay. If WCUSC plans to water the playing fields that is another issue. Mrs. Dewey stated the plan before the Board is not delineated. The wetlands and floodplain lines cannot be defined. Mr. Lang questioned the need for such a large storage building (50" X 24). The Board asked Mr. Wilson and Mrs. Dewey to meet Mr. Dan Kennedy and review the plan. Mr. Lang will forward his comments prior to the meeting. Mr. Miller stated that the PC has not been given the opportunity to comment on the plan. The PC has concern that the building must be at least 100' from the wetland area and that WCUSC tie into public water. Mr. Wilson advised that any improvements to the site requires a review and permits from DEP.

Planning Commission

Mr. Miller reported on the PC's meeting held December 10, 1997. The following plans were reviewed: (1) Exxon Land Development Plan (2) Percy Neall 3-lot Final Subdivision (3) Robert Gleichert 3-lot Preliminary Subdivision. Mr. Miller recommended that Mr. Gleichert should be put in touch with Bill Mineo at the Chester County Park & Recreation to determine if there is an interest on the County's part to acquire the property as parkland. Mr. Miller commented that the PC also addressed their list of goals for 1998 and plan to have special work sessions. Mr.

Miller asked if he could meet in Executive Session with the Board at the conclusion of the public meeting.

Discussion took place on the need for a basic understanding between the Chester County Health Department (CCHD) and township. Mr. Rossiter stated that the township needs an ordinance to support CCHD's disapproval. Mr. Wilson suggested the township talk to CCHD.

Park & Recreation Commission (P&R)

Mrs. Tindall told the Board that P&R recommend naming the park "Goose Creek Park". The Conmiission set goals for 1998; i.e., preservation of historic areas, open space, trails, etc. P&R has rejected any "bow and arrow" activity in the park. Mrs. Tindall announced that the Tree Lighting Festival at the park on December 13th was a huge success. Mrs Tindall commended the P&R members for an outstanding job. The Board thanked Mrs. Tindall, Mrs. Dewey and the P&R members for their work. Mrs. Tindall stated many other activities are being planned for the park. A motion was made, seconded (RM/PD) and carried to table naming the park at this time. Mr. Lang was asked to talk with the Historic Commission and ask for their input before naming the park.

Engineer Contract 1998

Mr. Rossiter reported that the contract for next year is approximately 3% to 4% higher. After some discussion it was agreed to table any action until the reorganization meeting.

Bill List Approval

Mr. Wilson asked the Board to approve a payment to James Gillespie in the amount of $1700. This item was not included in the Bill List. It is partial payment for the documentation of the barn. HOV will reimburse the township $800. Mr. Gillespie has 80% of the work completed. Mr. Lang asked that Mr. Gillespie submit a disk to the township demonstrating exactly what has been done before payment. A motion was made, seconded (RM/PD) and carried to approve the Bill List.

Announcements

Reorganization – will be held Monday, January 5, 1998 at 7:30 P.M. The regular meeting of the Board will follow.

Codification – Notice of the adoption of the Code has been advertised as required by law.

Thornbury Commercial Center

A motion was made, seconded (CL/PD) and carried to execute the commercial lease (former Headlights Salon) for Joya Gift Shop subject to review of the changes as discussed by the Board and the Solicitor's opinion.

Dallett Environmental Assessment

Mr. Rossiter informed the Board that Satterthwaite Associates estimated the cost for the work between $35,000/$40,000. The Dallett family is waiting for the township's issue list. Mr. Lang told the Supervisors that he wanted another opinion regarding Satterthwaite's conclusion. A motion was made, seconded (RM/PD) and carried

that Mr. Lang contact another environmental specialist for a second opinion.

Other

Mr. Wilson asked the Board if they wished to hold an appreciation dinner for all the people who work for and volunteer their services to the township. The Supervisors endorsed Mr. Wilson's suggestion. Mr. Wilson will try to target a date in January 1998.

Public Comment

Ben Johnson asked the Supervisors to send the Solicitor to the ZHB if Robert Gleichert requests a hearing. Mr. Johnson felt that the applicant is trying to circumvent the flag lot ordinance.

Mr. Stevenson noted that Don Stark of Urban Engineers stated that PennDOT has plans major for improvements along Route 202 within 5 years. Route 926 will cross over Route 202.

Mr. Stevenson stated that the residents in Thornbury Estates are spending between $14,000 to $22,000 upgrading and replacing septic systems. TE should be advised if there is the potential of running public water and sewer before the homeowner make these investments.

Adjournment – A motion was made (CL/PD) and carried to adjourn the meeting at 10:25 P.M. Mr. Wilson announced

that the Board was going into Executive Session with Mr. Miller.

Respectfully submitted,

Constance Dulin
Township Secretary

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(2)

Supreme Court, U.S.
FILED

No. 04 1121 FEB 17 2005

OFFICE OF THE

In The

Supreme Court of the United States

THORNBURY NOBLE, LTD.,

Petitioner,

v.

THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the Members of the Board of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON and ROBERT A. MacDONNELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II, PAGES 184 TO 423

MARY ANN ROSSI, ESQUIRE
MACELREE HARVEY, LTD.
17 West Miner Street
P.O. Box 660
West Chester, PA 19381-0660
(610) 436-0100
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

EXHIBIT 12

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	: CIVIL ACTION
Plaintiff	:
Vs.	:
THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and The members of the Board of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MacDONNELL,	:
Defendants	: NO. 99-CV-6460

AUGUST 2, 2001

Oral deposition of ALLAN BAUMHOLTZ, in the above captioned matter, held at the offices of Siana, Bellwoar and McAndrew, 941 Pottstown Pike, Chester Springs, Pennsylvania, commencing at 1:30 p.m., on the above date, before Bonnie Block, Court Reporter and Notary Public.

* * *

[7] A. Yes.

Q. Are you taking any medication or under the influence of anything that would make it difficult for you to take in my question and give me an answer to them?

A. Nothing that I take would impair my ability to respond to you properly.

Q. Very good. All right. Would you state your name and address for the record, please?

A. Allan P. Baumholtz, B-A-U-M-H-O-L-T-Z; 1824 Spruce Street, Philadelphia, Pennsylvania 19103.

Q. What is your relationship to Thornbury Noble?

A. I am a limited partner in the legal structure of that complex.

Q. When did you become a limited partner?

A. 1991, I believe it was.

Q. Have you remained in the [8] same capacity since 1991?

A. No. When I first got involved with Mr. Acciavatti, as he mentioned here earlier, he had come upon hard times financially. And he needed money and I made an investment with him. I was enamored with his plan and what I thought Thornbury Township was all about and I willingly invested.

Q. What was it about Thornbury Township that enamored you?

A. Well, I'm a real estate appraiser. I'm licensed in both Pennsylvania and New Jersey. I'm a city dweller for all my life and just love the country setting. And when I

get out there and see how business is thriving, I just can't get enough of it.

Q. So in the beginning, in 1991, you were not a limited partner?

A. I was a limited partner, but inactive. And anything that was going on, the Acciavattis were doing, they just [9] needed my money.

Q. Understood. Has your role changed as regards to ownership, or are you still a limited partner?

A. Still a limited partner, but I own 35 percent now of the legal entity.

Q. As opposed to what in 1991?

A. Five, 10, 15. It's gone up to 35 as money went into the project.

Q. Okay. Now, you said that in the beginning you played very much of a passive role.

A. True.

Q. When did you take an active role as regards to the Thornbury Noble site?

A. My recollection was the beginning of 1998. Matters had gotten to a point of total frustration for both John and Richard, more John than Richard. Richard is younger, as you do know. And it seemed that he just was unable to make any headway. And I was on

* * *

[14] Pike. And I had John and Richard come with me, because I do not have the full understanding of what the

center was going to cost him. So they accompanied me to that meeting. At that point, we were introduced to Richard Dugan, who was my contact, because he then came in as the head of the Real Estate Department. Although Skip was in charge of real estate for all the brothers, Dugan sat in as, to use your word, the point man. He was the guy who had to go out and approve the sites.

Q. When did this take place, where you reached out to Genuardi's?

A. This had to be prior to that July meeting when Dugan went with me, had to be within that four, five-month period.

Q. Did the action of you reaching out to Genuardi's occur after you changed from a passive to an active role?

* * *

[19] have trouble running errands for people. It's me or it's not me. And that was the whole thing.

Q. Am I correct then that you played no role as regards to Thornbury Noble trying to acquire tenants for the L-shaped strip mall prior to 1999?

A. Yes. I think that's a good statement.

Q. Okay. Prior to the time when you took an active role with Thornbury Noble in the early part of '98, how many land development projects had you been involved in?

A. None. This was my very first. If I may, I didn't consider this, as you are saying, a land development project. I felt this was a completed situation I was walking into in '98. Everything was supposedly done.

Q. In what sense?

A. The approvals were there. Everything was in place.

[20] Q. What was your understanding, in early '98, of what had been approved for that Thornbury Noble site?

A. The configuration of an L-shaped retail center and a pad to incorporate a 12,000 square foot office, for a total of 50,000 square feet that was due us. And my perception was that I had a legal vested right because of the building permit that was in existence and, as you pointed out, had a time limit, that going to them with the idea of the market wasn't a farfetched idea. It was taking a configuration of an L and giving them a box.

Q. Okay. And it was changing the type of use or uses; correct?

A. No. Well, we went from a multi-tenant retail to a single tenant retail.

Q. Okay. At any point, from the time you assumed a more active role with Thornbury Noble up to the present,

* * *

[22] respect to they preferred the building not being right at the intersection of the street entrance to the center, but they wanted it back. To give them full front access, we had to request a change, an increase of the B Commercial of 192 lineal feet. It was less than an acre and a quarter of land area that we were seeking their approval, so that we could put Genuardi's where they wanted to be.

Q. And to do that you would have to achieve rezoning of a Residential parcel, as described by you –

A. Yes.

Q. – to B-Business?

A. Yes. And that was the request that I went in for initially.

Q. In July of 1998?

A. Yes, when I introduced myself as the person in charge of Thornbury Noble.

Q. What was your impression, coming out of that meeting, as to whether

* * *

[95] A. I believe it was in their sole power to make a judgment call and say, yes. I mean, I believe we had the legal right to do it. I think they had the ability to, yes, go forward.

Q. Were you of the mind that Thornbury Noble had any right to have the Thornbury Noble tract rezoned?

A. Absolutely not. I was asking.

Q. Okay. You told me about with the October 6th letter there was an A Plan and a B Plan. And one of the plans was for rezoning and the other plan was to put the supermarket in the B District as it was then zoned.

A. One was rezoning and one was amending the final plan, as I have come to learn the terminology.

Q. Okay. As regards to the plan to amend the final plan, did you, on behalf of Thornbury Noble, acquire any knowledge as to what was submitted to the

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
VOLUME II

THORNBURY NOBLE, LTD. Plaintiff Vs. THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and The members of the Board of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A. W. WILSON, and ROBERT A. MacDONNELL, Defendants	:	CIVIL ACTION NO. 99-CV-6460

AUGUST 10, 2001

Oral deposition of ALLAN BAUMHOLTZ, in the above captioned matter, held at the offices of Siana, Bellwoar and McAndrew, 941 Pottstown Pike, Chester Springs, Pennsylvania, commencing at 9:00 a.m., on the above date, before Bonnie Block, Court Reporter and Notary Public.

* * *

[119] do the – am I over-talking?

Q. Yes.

A. I'm sorry. We were not going to be able to do the market and drugstore operation. And we will emphatically not get it. He was sorry, but, business-wise, they were directed to move on, there are going down to the Waters piece. And they did go down and negotiate.

Q. I want to explore that a little bit. First, I want to understand the proposal on the table, to your understanding, for which you are waiting for a response from the Board of Supervisors, am I correct that proposal is that the Genuardi's store would be located immediately adjacent to the Berdich property line?

A. Not to it, but, yeah, that would be the property that you identified when John was here, the two acres.

Q. Yes.

[120] A. Where his former office was.

Q. Right.

A. That, basically, sits just to the east of this driveway. If you remember, they wanted the driveway for Thornbury Commons to line up with the Westtown Shopping Center. So the two-acre portion is east of this line. And that acreage is greater than 192 feet, but my request was to give me that 192 to accommodate their building.

Q. Genuardi's?

A. The Genuardi's concept, which gave us, at that point, better than 100 feet before the Berdich property. I had acquired the Berdich property in anticipation of my presentation and in my presentation offered to Deed restrict 3.3 acres to Residential, to put in whatever landscape screening was necessary to obliterate the view.

Q. Okay. So the proposal for which you were waiting for a response

* * *

[189] Q. – Dugan that they were going to go elsewhere?

A. Not really. It certainly falls within a reasonable time, considering when I had that presentation and I was waiting for the answer, but, honestly, not.

Q. At what point did you start, Thornbury Noble start to pursue Super Fresh?

A. The second time?

Q. The second time.

A. I think it was about October of '98.

Q. And who was involved from Thornbury Noble's end in pursuing Super Fresh?

A. Well, basically, I initiated a call to John Majczan; I never say his name right. And he was still put out with me because of how I didn't treat him earlier. So I asked John Acciavatti to get back involved, because that was his

* * *

[255] Q. Do you have an independent recollection –

A. Yes.

Q. – of being present for that meeting?

A. Yes, I do.

Q. I note that your attorney now is Carl Hanzelik; is that correct?

A. That is correct.

Q. When did you hire Mr. Hanzelik?

A. I can't give you an exact time. I guess I could, but I don't know off the top of my head. It has to be in this general – I think Hanzelik was not with me in July. Could I see the July 7th meeting minutes? I don't know whether he was with me or not.

MR. STYER: I will represent to you that Jack Nilon was at the July 7th.

THE WITNESS: Nilon was at the 7th, so it was after that that [256] Hanzelik came on board with me.

BY MR. GONZALES:

Q. Were you still using Mr. Nilon or had you switched over?

A. I switched.

Q. Why?

A. Why? I don't truly recall. My recollection is that, in talking with Hanzelik, he was referred to me as a people person and that's my background and I went to him. I just thought he'd be a little – I didn't like Nilon's approach with the Board.

Q. What didn't you like about Nilon's approach with the Board?

A. For our first meeting, in representing me, I found him argumentative. And I don't feel you get anywhere being argumentative. And I thought Hanzelik was just a softer person.

Q. How long did he serve as your attorney in this matter?

[257] A. A couple of months, that's all.

Q. Do you recall who was the attorney that you used after Hanzelik?

A. Mary Ann Rossi.

Q. Do you recall when you hired Mary Ann?

A. I think that was August, late – Hanzelik could have been with her. I think she came on with me August of '98.

Q. Why did you switch from Hanzelik to Mary Ann Rossi?

A. I was introduced to Mary Ann as someone familiar with zoning and had a good rapport with this type of a situation.

Q. Why did you go to the August 4th meeting?

A. I think we were asked. We were invited back and we wanted to, again, see if there was any news. We left the July meeting with the

* * *

[271] Q. Okay. The next sentence says: Mr. MacDonnell replies, if Mr. Baumholtz could prove it would be impossible to develop the property without expanding the size, the Board would re-evaluate the zoning request. Do you recall Mr. MacDonnell saying that?

A. Something to that effect, yes.

Q. And did you respond or did anyone on your behalf respond to Mr. MacDonnell's statement?

A. I don't think Mr. MacDonnell allowed too much of a response.

Q. That wasn't my question.

A. I'm sorry.

Q. Did you hear what my question was?

A. Yeah. Again, no. First, no, but I think the question – the sentence is self-explanatory. I already had the approval for a strip.

Q. The answer is, no?

[272] A. No.

Q. Next paragraph, this talks about Mr. Giacinto. Do you remember Mr. Giacinto addressing the Board at that meeting?

A. Yes.

Q. Do you remember Mr. Giacinto saying, as recorded in the second sentence: Mr. Giacinto told the Board he's very confused and dismayed that the site is going from an office center to a strip shopping center. Do you remember him saying that?

A. I don't remember Mr. Giacinto making any statements, but I will assume, yes.

Q. No, I don't want you to assume. I want to know if you recall Mr. Giacinto making that statement?

A. I'm hard-pressed to say that I specifically remember something from that time vintage.

Q. I understand there are some

* * *

[276] between what would be a specific service oriented location to one that would be multiple tenants. I had no idea who was going to come in.

Q. The next sentence says: Mr. Wilson notes there is no plan and recommended that Mr. Giacinto work with Mr. Baumholtz to help convince the Board to re-evaluate the rezoning request. Do you recall Mr. Wilson saying that at that meeting?

A. Yes. And that, too, I found to be lip service, because I had done my homework with the neighbors and they were there and they were openly not even considered; ignored, I want to say.

Q. But Mr. Wilson made that statement; is that correct?

A. Yes.

Q. Did you respond? Did you or your attorney respond to that statement?

A. Not that I recall.

Q. Next it says: Mr. Wilson

* * *

EXHIBIT 13

[LOGO]
GENUARDI'S
FAMILY MARKETS

April 21,1998 | Faxed:

Mr. John G. Acciavatti, President
Noble Enterprises, Inc.
PO Box 179
Westtown PA 19395

Re: The Commons at Thornbury
Genuardi's Family Markets, Inc.

Dear Mr. Acciavatti:

We have forwarded under separate cover our check in the amount of $4,360.50 for reimbursement of our equal share of the expenses in order to obtain a rezoning of the above captioned property, as outlined in our non-binding letter agreement dated December 5, 1997.

As we discussed in our meeting of April 1, you will be filing for a zoning change and expect to have the rezoning application heard prior to May 30, 1998. If it becomes evident that the rezoning application is not going to be granted, we will decline from sharing in any future expenses.

In addition, as we also discussed, despite the terms outlined in the non-binding agreement of December 5, 1997, if the rezoning application is not approved, Genuardi's Family Markets, Inc. is not prepared to proceed with the project.

Notwithstanding the understanding expressed above, no contract shall exist for the leasing of the store site herein

described until a final lease agreement is executed and delivered by both parties.

Sincerely,

/s/ Richard Dugan
Richard Dugan
Director of Real Estate

RD:dc

cc: Roger K. Wright, Vice President,
Real Estate & Development
Robert C. Fernandez, Esquire

EXHIBIT 14

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD	*	Civil Action
Plaintiff	*	No. 99 CV-6460
v.	*	
THORNBURY TOWNSHIP, Chester	*	
County, THORNBURY TOWNSHIP	*	
BOARD OF SUPERVISORS, and the	*	
Members of the Board of Supervision	*	
in their official capacity: PATRICIA	*	
A. DEWEY, J. CHRISTOPHER	*	
LANG, WILLIAM A. SCHMIDT, JR.,	*	JURY TRIAL
CHARLES A.W. WILSON and	*	DEMANDED
ROBERT A. MacDONNELL	*	
Defendants	*	

* * *

DEPOSITION OF RICHARD DUGAN

The Deposition of Richard Dugan, taken in the above-captioned case on Tuesday, August 28, 2001, commencing at 11:00 a.m., in the Offices of Giant Foods, 6300 Sheriff Road, Landover, Maryland, 20785, and was reported by Dawn M. Hyde, a Notary Public.

* * *

[13] this deal?

A. Absolutely.

Q. Did you have an understanding about what the Acciavattis and Thornbury Noble intended to do at the site of the Commons at Thornbury?

A. We had worked out a site plan between us. What we needed for them to do to be able for us to build a store.

Q. And what was that, that Genuardi's needed to have done for that site?

A. There were access issues. We needed certain access points. We needed a certain parking ratio. And not only the ratio, but where the parking was located on the site. You can get a parking ratio by putting parking spaces behind a store, which doesn't work. And the placement of the store and how that related to the access points.

Q. Did you understand that Thornbury Noble was intending to request that there be some rezoning of that property?

A. Yes. A portion of the property. My understanding was the front portion was zoned. The rear portion, which we needed to be able to put the store on, was not zoned.

Q. So is it fair to say that Thornbury Noble [14] and Genuardi's discussed the moving back of the store onto that portion that was going to be rezoned?

A. Yes. That was a requirement of Genuardi's, that we could not fit on the zoned portion alone. We needed the rear portion to be rezoned to actually place the store there.

Q. When you say it was a requirement that that property be rezoned, was that to address the issues that you were talking about in terms of the access in and out of the site?

A. It was not only access, it was parking as well. And I believe it's covered in the deal letter or the Letter of Intent under Site Plan, item number XV.

Q. And I'll just paraphrase, but that's that the lessee and lessor will attempt a zoning and plan change to locate the building at the Berdich property line within twelve months.

From that, it says that Genuardi's agreed to share the legal and engineering expenses for that project.

A. I believe that's what we were referring to at the time.

Q. Following the signing of the Letter of

* * *

[22] MR. BELLWOAR: Thank you.

BY MR. STYER:

Q. Mr. Dugan, do you recall writing that letter?

A. I do not recall writing the letter. I recall the contents of the letter.

Q. Can you just tell me – just paraphrase it basically what the contents of that letter were?

A. We had an agreement to share expenses on proceeding forward on the rezoning efforts. Basically what it says, if the rezoning is not obtained, not only are we not going to proceed with any further expenses, but we would not proceed with building the store.

MR. GONZALES: Can I see that exhibit?

(Whereupon, witness proffers document to Mr. Gonzales.)

Q. Was that the first time that Genuardi°s had advised Thornbury Noble that they would not be willing to build without the rezoning?

A. I believe it was probably the first time we advised in writing. We had discussed it prior to that.

MR. BELLWOAR: Mr. Dugan, would you keep your voice up, please. I'm having trouble hearing

* * *

[34] July 24, 1998.

MR. BELLWOAR: July?

MR. STYER: 24, 1998.

MR. BELLWOAR: Thank you.

BY MR. STYER:

Q. Mr. Dugan, this is a memo from Mahlon Rossiter to the Board of Supervisors, dated July 24, 1998.

In this memo, it indicates that Bob MacDonnell, who is a member of the Board of Supervisors, indicated that he had been contacted by Richard Dugan to state that Genuardi's had decided to go with the Dilworthtown Crossing location.

Was it your practice to call Township officials and advise them of Genuardi's decisions about where to locate their stores?

A. Absolutely not. It's real estate practice, especially in the supermarket industry, where you don't announce to anybody, including your competition, what you're doing or where you're going.

Q. Do you recall whether you contacted Mr. MacDonnell and advised him of this fact?

A. I don't recall ever advising Mr. MacDonnell of that. Mr. MacDonnell and I had [35] conversations prior to the letter of July 22 to Thornbury Noble discussing the possibility of the rezoning. But it would be out of character for me to call anybody to say this is – to announce Genuardi's intentions of what they're going to do. If the question was asked, you know, we may discuss it, but that's just out of character.

Q. Do you recall whether Mr. MacDonnell told you that Thornbury Noble was not going to get the rezoning?

A. I recall having conversations with Mr. MacDonnell, and it's my belief that it was Mr. Macdonnell that – because he was the person that I talked to the most, that he was the one that advised me that it didn't look favorable for the Thornbury Noble to be granted that zoning. And that obviously triggered in our decision not to keep pursuing it.

Q. Did Mr. MacDonnell tell you about the Waters tract?

MR. GONZALES: Objection.

You can answer.

A. No. I don't think he told me about it. We were aware of it long before my discussions with him. You know, we had the opportunity earlier than

* * *

[63] we knew that we had to go to the Township to get it rezoned.

Whether we discussed that it would be an uphill battle or how much resistance there was, I don't think it was discussed at the time.

Q. In your experience in developing supermarkets, I mean is it your experience, is it typical or is it atypical for a Township or municipality to resist encroaching commercialism in a residential area?

MR. STYER: Objection to the form.

A. It can go both ways depending on how much the Township wanted to have you there. I've been in places where they welcome you with open arms and they will bend over backwards to accommodate, you know, building a store there. And other places, you know, some places don't want anymore commercial growth at all. They have a no-growth policy.

Q. So the issues that you were experiencing here, would you say that they were out of the ordinary or extraordinary concerning the issues regarding rezoning that residential –

A. I don't think it was out of the ordinary at all.

Q. After that December 5, 1997 meeting, is

* * *

[69] with Mr. MacDonnell.

Q. Tell me about those conversations? I mean who initiated the first contact with Mr. MacDonnell?

A. I believe I called first. His name was given to me by a third party as the person to contact because of –

MR. BELLWOAR: Can you speak up, please. I didn't catch that.

THE WITNESS: I'm not sure what you didn't hear.

MR. BELLWOAR: The answer to that last question, please.

THE WITNESS: I initiated the phone call, because it's a name I was given by a third party as the person to contact. And I'm sure I initiated the first phone call.

MR. BELLWOAR: Thank you.

A. Subsequent to that, I couldn't tell you whether it was a call back or –

Q. Who was the third party that gave you MacDonnell's name?

A. Our outside legal counsel, Steve Volpicelli.

Q. Did he say anything to you about Mr. MacDonnell, other than this is the guy to talk to?

[70] A. That's probably the extent of it. He said, this is the guy to talk to. I think he may have known him from another transaction or so or had dealt with him before.

Q. When you first spoke to Mr. MacDonnell, what did you talk about?

A. I couldn't tell you the exact nature of the conversation. It would be the possibility of rezoning, but I'm sure that was the nature of it, but I couldn't tell you exactly the conversation.

Q. Do you remember what he told you about the rezoning issue?

A. Not specifically.

Q. How about generally?

A. Generally, that it was an issue, it was going to be a problem. He didn't know how the other supervisors were going to vote, but specifically, no, I couldn't recall the exact conversation.

Q. Did he ever tell you why he felt that it may be a problem regarding rezoning?

A. I think – whether he mentioned it or someone else mentioned it, that there was some disappointment in the Acciavattis in not fulfilling the obligations in a timely manner, and that was an issue with the supervisors. That's all I recall.

* * *

[79] A. I don't recall.

Q. If that had happened, would that have been something that you probably would have been made aware of?

MR. STYER: Objection to the form.

A. Generally since we were working together on this project, we would know when filings would take place. Just like today if I were building a store, I would know when the developer was going in for site plan approval and rezoning, because I need to track it.

Q. Do you know whether Thornbury Noble ever submitted an application for rezoning at that site?

A. I don't know. I don't recall.

Q. Prior to the decision by Genuardi's to pull out of Thornbury Noble, do you know whether Genuardi's was ever advised by Thornbury Noble that it had submitted a formal request for rezoning?

A. I don't recall whether they had or not.

Q. Did Genuardi's ever place any deadlines on Thornbury Noble to accomplish rezoning?

A. It may have been discussed. I don't recall a specific date beyond which they would not proceed.

Q. And you said it was discussed. Do you

* * *

[117] for a contact person in the Township, not because of the Waters piece, but because we wanted to let's say find out what's – you know, how our project was proceeding at 926.

Q. Right. I'm just trying to get timing down. Waters would have contacted you first and then as you progressed with the Thornbury Noble site at some point thereafter –

A. I can't confirm that, whether I contacted the Township first or, you know, I was contacted by Waters first. It was all in the spring, but I couldn't tell you the order, whether one was before the other, because it's normal for us to contact the Township, whether there was another site or not.

Q. Now, the reason for contacting the Township was so that you could get an informal read as to where the Township stood on the rezoning, correct?

MR. STYER: Objection to the form.

Q. Is that correct?

A. That would be correct.

Q. And you knew that by calling MacDonnell, you were not going to get any official vote or reaction to the rezoning, correct?

MR. STYER: Objection to the form.

[118] A. That's correct.

Q. And you were not getting any official information, but rather you were getting, if you will inside information as to how to – how the Township was looking at the rezoning.

MR. STYER: Objection to the form.

A. That's correct.

Q. You said that you spoke with MacDonnell approximately three times. Do you know any of the dates that you spoke to MacDonnell?

A. No, I don't recall.

Q. Is there any documentation anywhere that you know of about the conversation or conversations with MacDonnell?

A. The only documentation would have been – possibly would have been in the minutes of the real estate committee meeting where I reported of my conversations to Mr. McDonnell or with Mr. McDonnell.

Q. Would you see those minutes after the meetings of the real estate committee?

A. Yes.

Q. Do you recall any reference by you to any conversation with MacDonnell?

A. I don't recall.

* * *

[120] talking about it.

A. Yes.

Q. Now, the fact that MacDonnell may have brought up the Waters piece, did that cause Genuardi's to go to the Waters piece?

A. No.

Q. Or were there other reasons?

A. There were other reasons. The other reasons were that Mr. MacDonnell advised that he didn't think that we were going to get the zoning at the 926 piece. And that's the reason we moved to the Waters piece, not because we thought it was a better site. It was because we couldn't get the site that we wanted and this was the only other one available.

Q. And to be specific, you couldn't get the rezoning at the site you wanted.

A. Correct.

Q. Now, did you ever make a determination as to whether a Genuardi's store could have gone onto the Thornbury Noble site as it was zoned?

A. Yes. We could have fit a store on there. It just would not have been a store that we could have operated successfully.

Q. And because you couldn't have operated it

* * *

EXHIBIT 15

THORNBURY TOWNSHIP, CHESTER COUNTY
BOARD OF SUPERVISORS

JULY 7, 1998

In attendance were Supervisors: Charles A. W. Wilson (Chairman), Patricia M. Dewey, Robert A. MacDonnell and William A. Schmidt; Robert Adams (Solicitor), Ronald J. Miller, Robert Eichman (PC), D.J. Tindall (P&R) and Mahlon Rossiter (Township Manager).

Mrs. Dewey called the meeting to order at 7:30 P.M. and led the Pledge of Allegiance.

Minutes Approval – A motion was made and seconded (WS/RM) to approve the minutes of meeting held June 16, 1998. Mrs. Dewey in favor. Mr. Wilson arrived after the motion.

Goose Creek Grill

Mrs. Dewey announced that any resident that returned the township survey is eligible for the for the complimentary dinner drawing at the Goose Creek Grill. Mrs. Tindall drew the name of Raymond Heinzelmann a resident at 455 Timberline Trail for the dinner compliments of the owners of the restaurant.

PennDOT Agility Program – Resolution 1998-13

Mr. Schmidt stated that the purpose of the Agility project is to develop a relationship between local governments and PennDOT by sharing services. Municipal employees may perform work for PennDOT in exchange for work on Township roads. Mr. Schmidt noted that the Agility

program applies more to larger townships. The state is looking for unanimous cooperation and there is no cost to Thornbury. A motion was made and seconded (WS/RM) to approve Resolution 1998-13 and the Agility Agreement. Mrs. Dewey in favor.

Springhouse at Brandywine – Escrow Release #3

A motion was made and seconded (RM/WS) to approve Yerkes Associates' (YA) recommendation to release $12,758.25. Total released to date is $464,928.85. This represents 39% of the project security with $740,971.15 remaining. Mrs. Dewey in favor.

Open Space Fund

Mrs. Dewey proposed establishing an Open Space Acquisition Fund with 50% of the monies the Township receives from the developers "Per Unit Contribution". Mr. Schmidt suggested setting aside a portion of the funds, approximately $15,000, for maintenance of the open space. Mr. MacDonnell recommended setting up this fund as a separate line item now and talk about details later. A motion was made and seconded (RM/WS).

Treasurer's Report, Financial Statement & Bill List

A motion was made and seconded (RM./WS) to approve the Treasurer's Report, Financial Statement and Bill List. Mrs. Dewey in favor.

Announcement

Mrs. Dewey noted that the household hazardous waste collection in E. Brandywine was very successful. All residents should receive a copy of the flyer listing materials accepted at the collection centers prior to 10/10/98. Mrs. Dewey emphasized that water based latex paint is not hazardous material and should not be taken to the collection site and explained how to dispose of the paint.

Park & Recreation Commission (P&R)

Mrs. Dewey stated that P&R (1) Recommended the Army Corps of Engineers and YA look at the existing bridge structure at the Goose Creek Park before spending money for a new bridge. (2) Requested the West Chester United Soccer Club (WCUSC) provide a list of chemicals being used on the field. P&R asked the Township to send a letter to WCUSC requesting their compliance. (3) Request the Park Rules & Regulations Ordinance be posted at Squire Cheyney Farm for Propstoppers to observe and at the soccer field for WCUSC. Propstoppers hours of operation should be restricted between 9:00 A.M. and dusk. Mr. Adams asked Mr. Rossiter for a memo regarding the items to be incorporated into a lease for Propstoppers.

Repaving Bid

Mr. Schmidt informed the Board that the Township has advertised to go out to bid for resurfacing Thornbury Road (1,550 s.y.), Audubon Road (2,850 s.y.), Buck Lane (2,260 s.y.) and Surrey Road (2,260 s.y.). The bids will be opened at the Supervisors meeting on July 21, 1998 at 7:30 P.M. Specifications are available at the Township Office. Mr. Wilson arrived at 7:45 P.M.

Thornbury Noble (TN) (a/k/a) Commons at Thornbury

Allan P. Baumholtz (Developer), Jack Nilon, Esq. and Richard Dugan (Genuardi's) were present on behalf of Thornbury Noble. John Ciccarone, William Wagenmann and John Featherman, Esq. representatives of 1st National Bank of West Chester were also present.

Mr. Nilon stated that when a sketch plan was presented several months ago there were two sources of opposition: (1) The housekeeping of the shopping center was not up to code. All of these complaints have been addressed by TN. (2) The concern voiced by neighbors located on the perimeter of the site. The revised site plan and discussion with the neighbors have addressed most of the concerns. Mr. Baumholtz has taken over the responsibility of the project. Mr. MacDonnell commented that many residents are opposed to converting zoning from residential to commercial. Mr. Nilon replied that TN views the rezoning as a better land use plan. TN is asking for 50,000 s.f. for Genuardi's and 10,000 s.f. for Happy Harry's. There would be two buildings rather than a strip shopping center incorporating 20 stores.

Mr. Baumholtz stated that he will be the owner of TN if things work out. Mr. Baumholtz informed the Board that he purchased the Burdich property and has a long term tenant occupying the house. The Burdich property will be used as a permanent buffer between the residential and commercial area and the Burdich property will be deed restricted up front prohibiting any future change in zoning prior to construction. Mr. Baumholtz promised to pave the Eichman driveway, plant trees on Route 926, completely enclose the entire commercial development with landscaping. If the Board approves TN's plan the landscaping will

be completed before permits are issued and construction begins. Mr. Baumholtz stated that he is requesting 192' of additional commercial zoning that translates to 1,000 s.f. more in total retail area with two users in contrast to 20 users.

Mr. Wilson asked why TN cannot go with the original plan. Mr. Baumholtz responded that he can go with 59,000 s.f. usage but the proposal before the Board is lesser utilization of the site. Mr. Rossiter inquired if TN had considered the increased number of cars at Calista Grand Salon. More cars are using the salon than when it served as an office building. Mr. Baumholtz responded that the parking situation has been appraised and the 5 to 1 ratio complies. Mr. Wilson commented that the Acciavatti family promised that rezoning would never be requested again and the Chester County Planning Commission asked the Township not to move commercialism further east along Route 926. Mr. Dugan explained the reasoning for positioning the building further east relates to traffic flow. Mr. Wilson asked for comments from the neighbors bordering the site.

Ronald Giacinto of 1240 Surrey Road told the Board that he vehemently opposed the supermarket plan in January when presented on behalf of Mr. Acciavatti. Mr. Giacinto stated that this project, over the past 10 years, has had a tremendous impact on his health and family life. Now that this project is out of Mr. Acciavatti's hands, the plan presented by Mr. Baumholtz would be much better. Mr. Baumholtz is willing to Deed Restrict all issues up front. The neighbors would rather see this plan as opposed to a Pep Boys or strip shopping center. Mr. Giacinto stated he did not want a supermarket in the past but Genuardi's is a reputable organization and any problems he has can be

brought to the attention of Genuardi's representatives. Mr. Baumholtz and his people are doing what they said they were going to do. Mr. Giacinto asked the Board to consider moving back the commercial zoning.

Robert Eichman noted that no one has contacted him regarding tonight's proposal. Mr. Acciavatti had three obligations that were never fulfilled: (1) Driveway ownership promised but never delivered (2) Complete the resurfacing of his driveway and (3) Correct the drainage problem at the top of the driveway bordering Route 202. Mr. Eichman stated he would appreciate getting these items done up front, 8 to 10 years of waiting is long enough. Mr. Eichman noted that the area between Happy Harry's (as shown on the new plan) and the drainage basin is going to need a lot more screening. The basin was never lined and only cleaned twice during the past 10 years. Mr. Eichman recommended approval of the plan providing there is a Deed Restriction *up front* that nothing else can be built on this site. Mr. Baumholtz noted that he will have Barry Walsh (Engineer) respond to Mr. Eichman's comments.

Helen Ruszkay of 190 E. Street Road stated if the Board can guarantee the commercial rezoning will not go past the Burdich property then she agrees with Mr. Eichman and Mr. Giacinto that it is a better plan. Mrs. Ruszkay expressed concern about additional traffic along Route 926 as a result of the supermarket, especially at rush hour. Mr. Eichman stated the traffic headed west on Route 926 in the afternoon is a problem and recommended looking into an additional left turn lane. Mr. Wilson noted that a traffic study would be necessary if the plan goes forward. Mr. Wilson asked Mr. Baumholtz for a copy of the sketch plan so that the township engineer could evaluate the proposal.

The representatives from 1st National Bank of West Chester stated they have been concerned and embarrassed by the conditions at the Commons. Mr. Wagenmann noted that they intend to keep the bank at this location and are there for the long haul. The representatives from the bank noted that Genuardi's proposal is a very attractive plan and urged the Board's approval. Mr. Ciccarone commented that he is in favor of the plan as long as the parking is adequate. Arthur Wood of Philadelphia was present to endorse Allan Baumholtz as being a very reputable developer. It was recommended a land planner review the parking configurations.

Mr. Schmidt asked if there is any interest in helping the township with open space to compensate for loss of residential zoning. Mr. Nilon replied that if there are Ordinances within the Township asking for a contribution toward acquiring open space it would be considered. Mr. MacDonnell stated that contributions to the Township have been made voluntarily. TN is asking this Board to intensify the use of the property and this Board desires to preserve additional open space to compensate for the loss to the Township. Mr. Wilson thanked everyone and Stated that the Supervisors will give this issue due consideration.

Public Comment

Mr. Giacinto requested that – prior to the repaving of Surrey Road if a drainage problem at the end of the cul-de-sac could be addressed. Mr. Schmidt responded that he will ask Neff Construction to take a look to determine if the drainage problem can be incorporated into resurfacing project.

Adjournment

A motion was made, seconded (WS/PD) and unanimously carried to adjourn at 9:10 P.M.

Respectfully submitted,

Constance Dulin
Township Manager

EXHIBIT 16

[LOGO]

GENUARDIS
FAMILY MARKETS

July 22, 1998

Thornbury Noble L & D
CYO Mr. Allan P. Baumholtz
1824 Spruce Street
Philadelphia, PA 19103

RE: Commons at Thornbury
Routes 202 and 926

Dar [sic] Mr. Baumholtz,

Your request to renegotiate the terms of the nonbinding letter of interest with Thornbury Noble L & D, for the above referenced site, was reviewed by the Real Estate Committee. As a result of that review, Genuardi's Family Markets Inc withdraws its letter of interest, dated 12-5-97, in this location. We wish you success in your development of this property.

Thank you for considering Genuardi's Family Markets.

Sincerely,

/s/ Richard Dugan
Rich Dugan

RD/kmb

EXHIBIT 17

THORNBURY TOWNSHIP, CHESTER COUNTY BOARD OF SUPERVISORS AUGUST 4, 1998

In attendance were Supervisors: Charles A. W. Wilson (Chairman), J. Christopher Lang (Vice-Chairman), Patricia M. Dewey, Robert A. MacDonnell and William A. Schmidt; Robert F. Adams (Solicitor), Robert Eichman (PC) and D.J. Tindall (P&R).

Mr. Wilson called the meeting to order at 7:30 P.M. and led the Pledge of Allegiance.

Minutes Approval – A motion was made and seconded (PD/WS) to approve the minutes of meeting held July 21, 1998. Mr. MacDonnell in favor. Mr. Wilson and Mr. Lang abstained due to their absence from the July 21st meeting.

Commons at Thornbury (CT) – Rezoning Request

Allan P. Baumholtz (Developer) and Carl Hanzelik (Attorney) were present on behalf of CT.

Mr. Wilson asked if there is any additional information since the July 7th meeting. The Board does not want to take any permanent action tonight but it might help the applicant know how the Board feels about the rezoning. Whatever discussion that takes place is not conclusive. Mr. Wilson polled each Supervisor asking them their opinion on extending the commercial zoning.

All members of the Board were not in favor of rezoning CT and cited the following reasons:

- Not convinced that a single large building has an advantage over any other commercial project.

- The parcel is large enough for success, it does not have to be expanded for a viable project
- Must be convinced that the proposal could justify the commercial expansion.
- There is a plan and that is what should stand.
- The Township should not make any changes unless there is some compelling reason.
- Pursue offices for the site.

The Board felt if there is a plan that Mr. Baumholtz wants to present they will be receptive to consider it and are open minded to whatever plan the applicant proposes. Mr. Wilson stated that the Board is sympathetic to the residents concerns.

Mr. Hanzelik stated that the Township is no longer dealing with Mr. Acciavatti. Mr. Baumholtz has done everything possible to accommodate the neighbors and Thornbury Township. The applicant is asking for a limited commercial rezoning of 192'. Mr. Baumholtz offered a form of protection to the residents when he purchased a property to buffer the residential and commercial areas to guarantee no further encroachment of commercial zoning. Mr. Hanzelik told the Supervisors that it is a very attractive plan and the neighbors support this rezoning. The promise to berm and landscape is welcome. Mr. Hanzelik asked if a shopping center is better than a first class outfit like Genuardi Markets.

Mr. Baumholtz stated that Mr. Wilson, at one time, was very much in favor of rezoning and now is not. Mr. Baumholtz told the Board that a strip shopping center will attract transients, create more traffic, and require more water and sewer. Mr. MacDonnell disagreed that a strip

center of this size would attract more traffic than a supermarket. Water and sewer are not a critical issue for a strip center and common sense would dictate using one trash hauler. Comparing the size of the market that requires expanding commercial, leads me to conclude that strip center is a better proposal. The Board agreed that proper landscaping between the neighbors and CT might be beneficial, but they did not see any benefits in expanding the commercial zoning to build a supermarket. Mr. Hanzelik asked if there is anything that Mr. Baumholtz could submit that might persuade the Supervisors to change their minds. Mr. MacDonnell replied, if Mr. Baumholtz could prove it would be impossible to develop the property without expanding the size, the Board would re-evaluate the zoning request. Mr. Lang recommended a review of exactly what had been approved for CT.

Mr. Giacinto stated that the No. 1 thing the residents did not want was a strip shopping center and No. 2 was a supermarket. Mr. Giacinto told the Board he is very confused and dismayed that the site is going from an office center to a strip shopping center. The residents had never been made aware that the application was changed. Ten years later the residents are getting a strip shopping center on ten acres, ten years ago it was 4 acres. The surrounding residents do not want transient traffic or the smell of a Chinese restaurant. Mr. Wilson noted that there is no plan and recommended that Mr. Giacinto work with Mr. Baumholtz to help convince the Board to re-evaluate the rezoning request. Mr. Wilson thanked Mr. Baumholtz for his appearance, and stated that the Board looks forward to hearing from him.

Burning Ordinance

Mr. Adams distributed the proposed ordinance and noted it will amend Chapter 68 of the Township's "Burning Ordinance". It was the Board's understanding, based on the Fire Marshal's presentation 7/21/98 that the Township did not have a burning ordinance. The Board will review Chapter 68 in conjunction with the proposed ordinance and tabled any action at this time.

Westtown Township – Act 537 Plan Revision

Mr. Wilson stated that Westtown's sewage treatment plant will service homes in Westtown that are north of Johnny's Way and east of Walnut Hill Road and does not abut Thornbury Township. The only impact to Thornbury will be water flow through the soccer field area via Chester Creek. A motion was made, seconded (CW/PD) and unanimously carried to write Westtown Township stating that Thornbury has no comment on their proposed Act 537 plan revision.

Springhouse at Brandywine – Escrow Release #4

A motion was made, seconded (RM/PD) and unanimously carried to approve the release of $150,815.50 from the established security. Total released to date is $615,744.35, this represents 51% of the security with $590,155.56 remaining.

Bill List – A motion was made, seconded (RM/WS) and unanimously carried to approve the Bill List with the exception of Check #5839.

EXHIBIT 18

707 Railroad Avenue • P.O. Box 68 •
Florence, New Jersey 08518 •
(609) 499-3900

SUPER *fresh*
FOOD MARKET

October 21, 1998

FAX (215)735-0931
REGULAR MAIL

Allan P. Baumholtz
1824 Spruce St.
Philadelphia, PA 19103

Re: Proposed Super Fresh
Route 202 and Route 926
Thornbury, PA

Mr. Baumholtz:

Outlined below is a summary of issues under which if agreement is reached on material terms (as such is herein after defined), I would be willing to request A&P corporate approval to proceed with a lease agreement:

Property:
Approximately seven (7) acres + located on the southeast quadrant of the intersection of Routes 202 and 926 in Thornbury, PA.

Landlord:
Thornbury Noble Ltd. Partnership

Tenant:
Super Fresh Food Markets, Inc.
P.O. Box 68
707 Railroad Avenue
Florence, NJ 08518

Conceptual Land Developmental Plan:
A retail shopping center containing a total gross leasable area ("GLA") of approximately 64,348 sq. ft. with on-site parking as shown on the site plan.

Demised Premises:
The Demised Premises shall be a one-story building containing a total area of approximately 48,000 sq. ft. plus a loading dock area.

Original Term:
Twenty (20) Years.

Option Terms:
Eight (8)- five (5) year options automatically exercised.

Option Notice:
Tenant must give Landlord written notice at least three hundred and sixty (360) days prior to the expiration of the then current term if it does *not* intend to renew.

Fixed Annual Rent:
As per Schedule "A", to be paid in twelve (12) equal monthly installments during each year the lease is in effect.

Rent Commencement Date:
Minimum rent under this lease shall commence on the earlier of (I) the date the tenant opens for business (II) the date of expiration of the "Tenant Fixturing Period."

Tenant Fixturing Period:
Landlord shall give Tenant written notice at least sixty (60) days prior to the date Landlord intends to deliver possession of the Building to Tenant with all of the Landlord's construction obligations for the Building completed thereto. Upon substantial completion and delivery of the

Building by Landlord to Tenant, Tenant shall have one hundred twenty (120) days ("Tenant Fixturing Period") to both (i) complete its store improvements, fixturing and stocking and (ii) open a fully merchandised supermarket. Tenant, at its sole cost, shall be responsible for completing the construction of the Demised Premises with regard to all items which are not included in or part of Landlord's Building Work (as hereinafter defined).

Utilities:
Tenant shall be solely responsible for the payment of all utility consumption and/or usage charges applicable to the Demised Premises.

Construction:
Landlord, at its sole cost, shall construct and deliver the Demised Premises in accordance with the plans and specifications delivered to Landlord ("Landlord's Building Work") by Tenant.

In addition to Landlord's cost to complete the Building, Landlord, at its sole cost, shall complete all site improvements in accordance with the Approved Plans and Specifications ("Landlord's Site Work").

Approvals:
Tenant at its sole cost and expense, shall provide all land use engineering plans and secure all standard governmental approvals, including Planning Board and Board of Supervisors, per the Township's ordinance for the contemplated improvements. Landlord shall allow the Tenant full rights to submit any and all applications to acquire such approvals. Landlord shall reimburse Tenant for all costs associated with the approval process, which shall include but not be limited to engineering, legal and other professional fees and shall be paid to Tenant on or before delivery

of possession. If Tenant is not successful in obtaining approvals, Landlord shall not be obligated to reimburse.

Permits:
Landlord, at its sole cost and expense, shall provide all building architectural plans and secure all building permits. The architectural plans shall be in accordance with our standard criteria plans and specifications which will be provided to the landlord.

Construction Completion:
Notwithstanding the aforestated, all construction shown on the site plan is to be constructed and completed at the same time Tenant's building is constructed and completed, including but not limited to the building, grading, paving, line striping, utility lines, drainage, lighting, landscaping, approaches, loading areas, platforms, and service roads as required. The out-parcels, if any, are to be in the positions shown on the site plan and the off-site improvements are to be completed, including but not limited to fully operational traffic lights, stacking lanes, acceleration lanes and deceleration lanes, as required.

Real Estate Taxes:
Tenant shall pay all real estate taxes (i.e. City/County, and School) applicable to its specific separately assessed parcel when due.

Common Area and Maintenance Insurance:
Tenant shall pay its proportionate share, based on aggregate GLA, of agreed upon common area maintenance costs for all common areas of the shopping center (collectively "CAM") as incurred or expended by Landlord on a calendar year basis. In addition to the foregoing CAM obligations, Tenant shall pay its proportionate share of Landlord's actual common area liability insurance costs

for all common areas of the shopping center and of Landlord's actual fire and extended casualty insurance costs for all buildings comprising a part of the shopping center, as the premiums for such insurance are incurred or expended by Landlord on a calendar year basis. Tenant's pro rata share of CAM charges shall be based upon the ratio of Tenant's building size to the square footage of all buildings shown on the approved site plan (whether or not constructed).

Repairs, Replacements and Maintenance:
Landlord, at its own cost, shall maintain all buildings throughout the shopping center in good order and condition. Landlord shall be responsible for all structural replacement and repairs to the Demised Premises, i.e. the roof, walls, footings and slab, for exterior or unexposed repairs and replacements and for parking lot repair and replacement. Landlord shall also be responsible for repairs, replacement and maintenance of the common area improvements which shall include but not be limited to parking lot, light stanchions, landscaping, snow removal and sweeping, which shall be reimbursable in CAM by Tenant (replacement of the roof and parking lot shall not be included in the CAM). For the first year of the term, the Landlord shall be responsible for the repair and replacement of the HVAC system. It is to be understood that in the event all warranties are not assigned to Tenant after the first year then the Landlord would remain responsible for both repair and replacement. In addition, Landlord agrees to restrip the parking lot every 36 months unless required sooner. Tenant shall be responsible for interior, non-structural repairs and replacements.

Alterations:
Tenant shall have the right, at Tenant's expense, to make interior structural or non-structural alterations, changes or improvements to the Demised Premises, provided such alterations shall not reduce the footprint and/or impair the structural integrity of the Demised Premises. Tenant to obtain Landlord's written consent prior to exterior alterations (except signage faces) not to be unreasonably withheld. Tenant to submit design drawings to Landlord for review when exterior alterations are being proposed.

Landlord agrees not to change the parking lot ratio/layout or make any other changes to the site plan or exterior decor of the shopping center, without Tenant's approval.

Negotiation of Lease Agreement:
(i) Within thirty (30) calendar days from the date of A&P Corporate Approval (the "Negotiation Period"), Landlord and Tenant shall proceed expeditiously, continuously and in good faith to negotiate and consummate a definitive Lease Agreement (the "Agreement") for the transaction covered hereby, which Agreement shall contain the terms set forth herein and such other essential and material terms, covenants, conditions and provisions (Material Terms) as shall be mutually agreed to by the respective parties and essential to the closing of the transaction. It is acknowledged by Landlord and Tenant that this letter sets forth only some of the Material Terms of the transaction and that additional Material Terms will need to be agreed upon before a Lease Agreement can be executed. Those remaining Material Terms include but are not limited to: development timing; subordination; recognition; non-disturbance and attornment; Tenant's rights with respect to Tenant's fixtures; Landlord warranties and representations; quiet enjoyment; force majeure; holding over;

Landlord' default; Tenant's default; damage or destruction; eminent domain; distraint: estoppel; notice provisions; mechanic's liens; right of first refusal and environmental issues.

(ii) Within thirty (30) days of a signed lease, Landlord's architect (which shall be approved by Tenant) shall prepare detailed plans, and specifications for Tenant's intended Building, which Building plan shall establish and/or set forth the specifications as shall be applicable to Landlord's construction obligations for the Demised Premises.

(iii) Neither party shall be bound to any transaction until such time as an Agreement has been executed. If Landlord and Tenant are unable to reach a complete and final Agreement, for any reason whatsoever, neither party shall have any claim against the other. Prior to the execution of an Agreement, either party may terminate negotiations without creating any obligation to the non-terminating party.

Restrictive Covenant.

Subject to existing uses and tenancies, Landlord shall not permit, except for the Demised Premises, any premises in the shopping center to be occupied for the sale of food for off-premises consumption, the sale of health and beauty aids, and/or the sale of prescription drugs. Landlord further agrees it shall not lease any portion of the shopping center for any noxious or offensive use or except as specifically set forth in the Lease Agreement, for manufacturing, or for use as a restaurant, bowling alley, funeral parlor, warehouse, office or non-retail use, except landlord shall be permitted to lease to a financial institution, real

estate office, financial service office, insurance agency sales office, or rental travel agency.

Use:
The Demised Premises may be used for a supermarket, pharmacy or for any lawful retail or service purpose. Nothing contained herein shall be deemed an obligation to continually operate any use from and within the Demised Premises. Landlord and Tenant shall negotiate recapture rights in the event that Tenant shall "Go Dark" for a period of twelve (12) months or more. Tenant shall be permitted to operate twenty-four (24) hours a day

Assignment/Sublet:
Tenant shall have the right without Landlord's consent to assign, sublet or license all or part of the Demised Premises provided that Tenant shall remain liable under the Lease.

Signs:
The center is identified by at least one (1) main pylon sign. Tenant has the right to use the top position for Tenant's sign. Tenant's sign shall be equal to or greater than the signs of the other major tenants of the center. If another pylon sign exists, Tenant shall also have the right to use the top position for its sign. Furthermore if an additional pylon is approved, Tenant shall have the right to the top position for its sign and reserves the right to approve the size of all other signs on the pylon.

Site Plan:
Any agreements are contingent upon site plan approval by the Tenant, including ongoing approval of changes whether required by the municipal authorities, or not, including but not limited to, building location, size, on and

off-site traffic controls, or signage that pertain to the present site.

Guarantee:
This lease will be guaranteed by The Great Atlantic and Pacific Tea Company Inc,

Transfer Tax:
Tenant shall pay for 100% of the transfer tax cost (if required) associated with the recording of the memorandum of lease.

Non Binding Proposal:
The terms and conditions contained herein are not intended to be contractual in nature and should not be considered binding on either Tenant, Landlord and/or their respective representatives. Landlord shall have no obligation to lease the Demised Premised [sic] to Tenant nor shall Tenant have any obligation to lease the Demised Premises from Landlord unless and until a written Agreement, in form and substance satisfactory to Landlord and Tenant, has been executed and delivered by and between the parties.

If the terms and conditions herein are acceptable, please sign where indicated below and return one original to my attention so I may present the deal for corporate approval.

Very truly yours,

SUPER FRESH FOOD MARKETS, INC.

/s/ John Majczan
John Majczan
Director of Real Estate

JEM/mld
Enclosure

Agreed and approved
this 21 day of Oct, 19998 [/s/ AB]

[Company] Thornbury Noble, Ltd.

By /s/ Allan P. Baumholtz
(Name)
Its: Owner/Gen. Partner

Schedule "A"

DATE: 10-21-98

LOCATION: Rt. 202 and Rt. 926
Thornbury, PA

STORE SIZE: 48,000 sq. ft. +/-

YEARS	FIXED ANNUAL	PER SQUARE FOOT
Years 1-5	$720,000.00	$15.00
Years 6-10	$765,000.00	$16.00
Years 11-15	$816,00.00	$17.00
Years 18-20	$864,000.00	$18.00
Years 21-25 (Option 1)	$912,00.00	$19.00
Years 25-30 (Option 2)	$960,000.00	$20.00
Years 31-35 (Option 3)	$1,008,000.00	$21.00
Years 36-40 (Option 4)	$1,056,00.00	$22.00
Years 41-45 (Option 5)	$1,104,00.00	$23.00
Years 46-50 (Option 6)	$1,152,00.00	$24.00
Years 51-55 (Option 7)	$1,200,000.00	$25.00
Years 56-60 (Option 8)	$1,248,00.00	$26.00

EXHIBIT 19

707 Railroad Avenue • P.O. Box 68 •
Florence, New Jersey 08518 •
(609) 499-3900

SUPER *fresh*
FOOD MARKET

March 8, 1999

VIA FAX (610)459-3316
& REGULAR MAIL

Thornbury Noble
1845 Middletown Rd.
Glen Mills, PA 19103

Re: Proposed Super Fresh
Route 202 and Route 926
Thornbury, PA

Gentlemen,

Outlined below is a summary of issues under which if agreement is reached on material terms (as such is herein after defined), I would be willing to request A&P corporate approval to proceed with a lease agreement:

Property:
Approximately seven (7) acres + located on the southeast quadrant of the intersection of Routes 202 and 926 in Thornbury, PA.

Landlord:
Thornbury Noble Ltd. Partnership

Tenant:
Super Fresh Food Markets, Inc.
P.O. Box 68
707 Railroad Avenue
Florence, NJ 08518

Conceptual Land Developmental Plan:
A retail shopping center containing a total gross leasable area ("GLA") of approximately 64,348 sq. ft. with on-site parking as shown on the site plan.

Demised Premises:
The Demised Premises shall be a one-story building containing a total area of approximately 51,975 sq. ft. plus a loading dock area.

Original Term:
Twenty (20) Years.

Option Terms:
Eight (8)- five (5) year options automatically exercised.

Option Notice:
Tenant must give Landlord written notice at least three hundred and sixty (360) days prior to the expiration of the then current term if it does *not* intend to renew.

Fixed Annual Rent:
As per Schedule "A", to be paid in twelve (12) equal monthly installments during each year the lease is in effect.

Rent Commencement Date:
Minimum rent under this lease shall commence on the earlier of (I) the date the tenant opens for business (II) the date of expiration of the "Tenant Fixturing Period."

Tenant Fixturing Period:
Landlord shall give Tenant written notice at least sixty (60) days prior to the date Landlord intends to deliver possession of the Building to Tenant with all of the Landlord's construction obligations for the Building completed thereto. Upon substantial completion and delivery of the

Building by Landlord to Tenant, Tenant shalt have one hundred twenty (120) days ("Tenant Fixturing Period") to both (i) complete its store improvements, fixturing and stocking and (ii) open a fully merchandised supermarket. Tenant, at its sole cost, shall be responsible for completing the construction of the Demised Premises with regard to all items which are not included in or part of Landlord's Building Work (as hereinafter defined).

Utilities:
Tenant shall be solely responsible for the payment of all utility consumption and/or usage charges applicable to the Demised Premises.

Construction:
Landlord, at its sole cost, shall construct and deliver the Demised Premises in accordance with the plans and specifications delivered to Landlord ("Landlord's Building Work") by Tenant.

In addition to Landlord's cost to complete the Building, Landlord, at its sole cost, shall complete all site improvements in accordance with the Approved Plans and Specifications ("Landlord's Site Work").

Approvals:
Tenant at its sole cost and expense, shall provide all land use engineering plans and secure all standard governmental approvals, including Planning Board and Board of Supervisors, per the Township's ordinance for the contemplated improvements. Landlord shall allow the Tenant full rights to submit any and all applications to acquire such approvals. Landlord shall reimburse Tenant for all costs associated with the approval process, which shall include but not be limited to engineering, legal and other professional fees and shall be paid to Tenant on or before delivery of

possession. If Tenant is not successful in obtaining approvals, Landlord shall not be obligated to reimburse.

If the lease is not fully executed within 60 days of the date hereof, Landlord shall reimburse Super Fresh 50% of the cost expended. However, if Landlord or any related party subsequently develops the project and Super Fresh is not a tenant, Super Fresh will be reimbursed 100% of the costs.

Permits:
Landlord, at its sole cost and expense, shall provide all building architectural plans and secure all building permits. The architectural plans shall be in accordance with our standard criteria plans and specifications which will be provided to the landlord.

Construction Completion:
Notwithstanding the aforestated, all construction shown on the site plan is to be constructed and completed at the same time Tenant's building is constructed and completed, including but not limited to the building, grading, paving, line striping, utility lines, drainage, lighting, landscaping, approaches, loading areas, platforms, and service roads as required. The out-parcels, if any, are to be in the positions shown on the site plan and the off-site improvements are to be completed, including but not limited to fully operational traffic lights, stacking lanes, acceleration lanes and deceleration lanes, as required.

Real Estate Taxes:
Tenant shall pay all real estate taxes (i.e. City/County, and School) applicable to its specific separately assessed parcel when due.

Common Area and Maintenance Insurance:
Tenant shall pay its proportionate share, based on aggregate GLA, of agreed upon common area maintenance costs for all common areas of the shopping center (collectively "CAM") as incurred or expended by Landlord on a calendar year basis. In addition to the foregoing CAM obligations, Tenant shall pay its proportionate share of Landlord's actual common area liability insurance costs for all common areas of the shopping center and of Landlord's actual fire and extended casualty insurance costs for all buildings comprising a part of the shopping center, as the premiums for such insurance are incurred or expended by Landlord on a calendar year basis. Tenant's pro rata share of CAM charges shall be based upon the ratio of Tenant's building size to the square footage of all buildings shown on the approved site plan (whether or not constructed).

Repairs, Replacements and Maintenance:
Landlord, at its own cost, shall maintain all buildings throughout the shopping center in good order and condition. Landlord shall be responsible for all structural replacement and repairs to the Demised Premises, i.e. the roof, walls, footings and slab, for exterior or unexposed repairs and replacements and for parking lot repair and replacement. Landlord shall also be responsible for repairs, replacement and maintenance of the common area improvements which shall include but not be limited to parking lot, light stanchions, landscaping, snow removal and sweeping, which shall be reimbursable in CAM by Tenant (replacement of the roof and parking lot shall not be included in the CAM). For the first year of the term, the Landlord shall be responsible for the repair and replacement of the HVAC system. It is to be understood that in

the event all warranties are not assigned to Tenant after the first year then the Landlord would remain responsible for both repair and replacement. In addition, Landlord agrees to reshape the parking lot every 36 months unless required sooner. Tenant shall be responsible for interior, non-structural repairs and replacements.

Alterations:
Tenant shall have the right, at Tenant's expense, to make interior structural or non-structural alterations, changes or improvements to the Demised Premises, provided such alterations shall not reduce the footprint and/or impair the structural integrity of the Demised Premises. Tenant to obtain Landlord's written consent prior to exterior alterations (except signage faces) not to be unreasonably withheld. Tenant to submit design drawings to Landlord for review when exterior alterations are being proposed.

Landlord agrees not to change the parking lot ratio/layout or make any other changes to the site plan or exterior decor of the shopping center, without Tenant's approval.

Negotiation of Lease Agreement:
(i) Within thirty (30) calendar days from the date of A&P Corporate Approval (the "Negotiation Period"), Landlord and Tenant shall proceed expeditiously, continuously and in good faith to negotiate and consummate a definitive Lease Agreement (the "Agreement") for the transaction covered hereby, which Agreement shall contain the terms set forth herein and such other essential and material terms, covenants, conditions and provisions (Material Terms) as shall be mutually agreed to by the respective parties and essential to the closing of the transaction. It is acknowledged by Landlord and Tenant that this letter sets forth only some of the Material Terms of the transaction

and that additional Material Terms will need to be agreed upon before a Lease Agreement can be executed. Those remaining Material Terms include but are not limited to: development timing; subordination; recognition; non-disturbance and attornment; Tenant's rights with respect to Tenant's fixtures; Landlord warranties and representations; quiet enjoyment; force majeure; holding over; Landlord' default; Tenant's default; damage or destruction; eminent domain; distraint: estoppel; notice provisions; mechanic's liens: right of first refusal and environmental issues.

(ii) Within thirty (30) days of a signed lease, Landlord's architect (which shall be approved by Tenant) shall prepare detailed plans, and specifications for Tenant's intended Building, which Building plan shall establish and/or set forth the specifications as shall be applicable to Landlord's construction obligations for the Demised Premises.

(iii) Neither party shall be bound to any transaction until such time as an Agreement has been executed. If Landlord and Tenant are unable to reach a complete and final Agreement, for any reason whatsoever, neither party shall have any claim against the other. Prior to the execution of an Agreement, either party may terminate negotiations without creating any obligation to the non-terminating party.

Restrictive Covenant:
Subject to existing uses and tenancies, Landlord shall not permit, except for the Demised Premises, any premises in the shopping center to be occupied for the sale of food for

off-premises consumption, the sale of health and beauty aids, and/or the sale of prescription drugs. Landlord further agrees it shall not lease any portion of the shopping center for any noxious or offensive use or except as specifically set forth in the Lease Agreement, for manufacturing, or for use as a restaurant, bowling alley, funeral parlor, warehouse, office or non-retail use, except landlord shall be permitted to lease to a financial institution, real estate office, financial service office, insurance agency sales office, or rental travel agency.

Use:
The Demised Premises may be used for a supermarket, pharmacy or for any lawful retail or service purpose. Nothing contained herein shall be deemed an obligation to continually operate any use from and within the Demised Premises. Landlord and Tenant shall negotiate recapture rights in the event that Tenant shall "Go Dark" for a period of twelve (12) months or more. Tenant shall be permitted to operate twenty-four (24) hours a day

Assignment/Sublet:
Tenant shall have the right without Landlord's consent to assign, sublet or license all or part of the Demised Premises provided that Tenant shall remain liable under the Lease.

Signs:
The center is identified by at least one (1) main pylon sign. Tenant has the right to use the top position for Tenant's sign. Tenant's sign shall be equal to or greater than the signs of the other major tenants of the center. If another pylon sign exists, Tenant shall also have the right to use

the top position for its sign. Furthermore if an additional pylon is approved, Tenant shall have the right to the top position for its sign and reserves the right to approve the size of all other signs on the pylon.

Site Plan:
Any agreements are contingent upon site plan approval by the Tenant, including ongoing approval of changes whether required by the municipal authorities, or not, including but not limited to, building location, size, on and off-site traffic controls, or signage that pertain to the present site.

Guarantee:
This lease will be guaranteed by The Great Atlantic and Pacific Tea Company Inc.

Transfer Tax:
Tenant shall pay for 100% of the transfer tax cost (if required) associated with the recording of the memorandum of lease.

Non Binding Proposal:
The terms and conditions contained herein are not intended to be contractual in nature and should not be considered binding on either Tenant, Landlord and/or their respective representatives. Landlord shall have no obligation to lease the Demised Premised [sic] to Tenant nor shall Tenant have any obligation to lease the Demised Premises from Landlord unless and until a written Agreement, in form and substance satisfactory to Landlord and Tenant, has been executed and delivered by and between the parties.

If the terms and conditions herein are acceptable, please sign where indicated below and return one original to my attention so I may present the deal for corporate approval.

Very truly yours,

SUPER FRESH FOOD MARKETS, INC.

/s/ John Majczan
John Majczan
Director of Real Estate

JEM/mld
Enclosure

Agreed and approved
this 8 day of March, 1999

Thornbury Noble

By /s/ Allan Baumholtz
(Name)

Its. _____

Schedule "A"

DATE: 3/8/99

LOCATION: Rt. 202 and Rt. 926
Thornbury, PA

STORE SIZE: 51,975 sq. ft. +/-

YEARS	FIXED ANNUAL	PER SQUARE FOOT
Years 1-5	$675,675.00	$13.00
Years 6-10	$688,668.75	$13.25
Years 11-15	$714,656.25	$13.75
Years 16-20	$740,643.75	$14.25
Years 21-25 (Option 1)	$766,631.25	$14.75
Years 26-30 (Option 2)	$792,618.75	$15.25

Years 31-35 (Option 3)	$818,606.25	$15.75
Years 36-40 (Option 4)	$844,593.75	$16.25
Years 41-45 (Option 5)	$870,581.25	$16.75
Years 46-50 (Option 6)	$896,568.75	$17.25
Years 51-55 (Option 7)	$922,556 25	$17.75
Years 56-60 (Option 8)	$948,543.75	$18.25

EXHIBIT 20

BEFORE THE BOARD OF SUPERVISORS OF THORNBURY TOWNSHIP, CHESTER COUNTY

IN RE: Application of Thornbury Noble, Ltd. for Amended Final Plan Approval or, in the alternative, for A Zoning Map Amendment

APPLICATION FOR AMENDED FINAL PLAN APPROVAL OR, IN THE ALTERNATIVE, FOR A ZONING MAP AMENDMENT

1. Applicant is Thornbury Noble, Ltd., a Pennsylvania Limited Partnership [hereinafter "Thornbury Noble"], with a principal office at 1121 North Providence Road, Media, PA 19063.

2. Thornbury Noble owns property consisting of 7± acres and located in the "B" Business zoning district on the southeast corner of the intersection of Routes 926 and 202 in Thornbury Township, Chester County, Pennsylvania [hereinafter "the Property"].

3. Thornbury Noble has secured approval of a final zoning and site plan, drawn by E. B. Walsh & Associates, Inc., dated January 27, 1993, last revised September 13, 1993, and approved by the Board of Supervisors on March 7, 1995 by ratification of an approval granted on October 5, 1993 [hereinafter "the Final Plan"].

4. Thornbury Noble wishes to develop the Property by construction thereon, in addition to the existing buildings and improvements, of a 50,000 square foot food market, which is a permitted use in the "B" Business District.

5. The construction of the food market as proposed by Thornbury Noble requires an amendment to the Final

Plan. A true and correct copy of a sketch plan of the proposed amended plan is attached hereto as Exhibit "A" and made part hereof.

6. In the alternative, and to provide a better site layout, Thornbury Noble seeks a rezoning of approximately 2 acres from A-Agricultural/Residential to B-Business.

7. The rezoning would allow construction on the Property, in addition to the existing buildings and improvements, of a 50,000 square foot food market and a 10,000 square foot drug store. A copy of the sketch plan for the rezoning alternative is attached hereto as Exhibit "B" and made part hereof.

8. The 2 acres sought to be rezoned abut the eastern boundary of the existing B-Business zoning district and are owned by Thornbury Noble.

9. In order to address any impact of the extension of the B-Business zoning district, and in order to assure no further extension of the B-Business zoning district to the east, Thornbury Noble will deed restrict the Berdich property, which abuts the eastern boundary line of the 2 acres that are the subject of this petition, from any non-residential development of any kind regardless of the zoning.

10. The rezoning alternative allows for a better interior flow of traffic than is provided on either the existing final plan or the amended final plan.

11. The rezoning will have no adverse impact upon the surrounding properties and, in fact, provides affirmative restrictions to prevent a further extension of the B-Business commercial zoning district.

WHEREFORE, Thornbury Noble requests that the Board of Supervisors amend the zoning map to rezone approximately 2 acres as aforesaid, or, in the alternative, to approve an amendment to the approved

Respectfully submitted,

/s/ Mary Ann Rossi
Mary Ann Rossi
FOX, ROTHSCHILD, O'BRIEN
& FRANKEL, LLP
Eagleview Corporate Center
760 Constitution Drive
Suite 104
P.O. Box 673
Exton, PA 19341-0673
(610) 458-7500

Date: October 6, 1998

EXHIBIT 23

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION

THORNBURY NOBLE, LIMITED	:	NO. 99-CV-6460
vs.	:	
THORNBURY TOWNSHIP, CHESTER COUNTY, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, the Members of the Board of Supervisors in their official Capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON and ROBERT MacDONNELL	:	

Tuesday, July 31, 2001
Exton, Pennsylvania

Oral Deposition of ROBERT F. ADAMS, ESQUIRE taken in the Law Offices of FOX, ROTHSCHILD, O'BRIEN & FRANKEL, LLP., Eagleview corporate Center, 760 Constitution Drive, Exton, Pennsylvania, commencing at 10:15 a.m., on the above date, before Eileen S. Arrison, Professional Court Reporter and Commissioner of Deeds.

LOVE COURT REPORTING, INC.
1422 Chestnut Street, Suite 408 Philadelphia, PA. 19102
(215) 568-5599

[2] APPEARANCES:

FOX, ROTHSCHILD, O'BRIEN &
FRANKEL, LLP.
BY: CRAIG A. STYER, ESQUIRE
Eagleview Corporate Center
760 Constitution Drive
Exton, PA 19341-0673
(610) 458-7337
Counsel for Plaintiffs

SIANA & VAUGHN, LLP.
BY: ANDREW J. BELLWOAR, ESQUIRE
Ludwigs Corner Professional Center
961 Pottstown Pike
P.O. Box 630
Exton, PA 19341
(610) 321-5500
Counsel for the Defendants

MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN
BY: JOHN P. GONZALES, ESQUIRE
One Montgomery Plaza, Suite 1002
Norristown, PA 19401-4814
(610) 292-4470
Counsel for Thornbury Township

[3] INDEX

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ROBERT F. ADAMS By MR. STYER		7
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Adams-1	Ordinance 1989-5	22
Adams-2	Application for amended final Plan Approval or, in the Alternative, for a Zoning Map Amendment	102

[4] DEPOSITION SUPPORT INDEX

DIRECTIONS NOT TO ANSWER:
PAGES: None

REQUESTS FOR DOCUMENTS OR INFORMATION:
PAGES: None

STIPULATIONS AND/OR STATEMENTS:
PAGES: 5,

MARKED QUESTIONS:
PAGES: None

* * *

[97] THE WITNESS: That's right.

BY MR. STYER:

Q. It's referenced that Mrs. Rossi told the Board that they were coming in with a – that they were presenting two plans to the Board, one plan showing the market on the existing commercial site and a second plan with the two-acre rezoning.

Do you recall that there were two plans submitted to the Board?

A. I do recall that and I think she sent me a set of those, which I think accompanied a petition for rezoning – maybe – it accompanied – there was some – they were in manila envelops [sic], the two plans stuck in, Exhibits A and B and I think there was a cover petition of some kind asking for that rezoning and a modification of their application in some respect.

Q. There's a statement that Mr. MacDonnell recommended the applicant go back to the Planning Commission and go through the regular land development process.

Do you recall Mr. MacDonnell making [98] that statement at the time?

A. I don't.

Q. Do you know why Mr. MacDonnell would make such a statement at that time?

MR. BELLWOAR: Objection.

THE WITNESS: I don't know why he made it – if he made it.

MR. STYER: Well, in the context of what was being presented, I mean, as a Solicitor and just in the regular land development process that's going on here.

MR. BELLWOAR: What's the question?

MR. STYER: Why would he have recommended that the applicant go back to Planning Commission?

MR. BELLWOAR: Objection.

THE WITNESS: If he didn't it – and I wouldn't be surprised if he said that – the Board of Supervisors

relies on the Planning Commission to evaluate proposals of this type.

MR. STYER: Of which type?

THE WITNESS: Of the type that –

MR. STYER: Does it require for [99] rezoning that the Planning Commission review it?

THE WITNESS: Well, she asked that the Board reconsider its position on rezoning. I think she understood at that point that the Board wasn't inclined to do it. And one of the plans that she submitted in this – if I'm correctly recalling – one of the plans that she submitted showed a supermarket on the property without the rezoning, the other one showed it with the rezoning. And I believe that Mr. MacDonnell's comment would have been directed at the plan without the rezoning which showed the supermarket and he's saying "Take it to the Planning Commission" – an entirely appropriate comment.

MR. STYER: Is that an appropriate comment if it's an amended final plan?

MR. BELLWOAR: Objection.

THE WITNESS: Sure it is. I don't concede that it was.

MR. STYER: I understand that but [100] I'm saying –

THE WITNESS: But it's an appropriate comment whether it was a new plan or an amended plan – although she had never filed any formal application. I think this was simply a sketch plan, a concept that she had presented to the Supervisors.

And if I could see it, I could recall what the cover sheet said. I don't remember exactly what she had submitted to us before that time.

BY MR. STYER:

Q. You're saying that she didn't file a formal application?

A. I don't think she filed a fully-engineered preliminary plan showing either of these concepts. I think she was showing the feasibility of developing the site with the additional rezoning and without the rezoning. And her position was that she could do it, she could put a supermarket on that site without a rezoning and she had a plan that demonstrated that in her opinion.

[101] Q. How was it that you recall that she didn't file an application?

MR. BELLWOAR: Application for point of impact?

THE WITNESS: I don't think it was a formal submission. I think it was a sketch plan. I don't think it was a formal land development application submitted to amend – but I'd have to see it.

I can tell you that what accompanied that submission, as I recall it, was a sketch plan. It didn't have any of the normal engineering detail that you would see in a land development plan.

BY MR. STYER:

Q. So the plan itself was not what you would have expected to receive for a formal land development plan. Is that what you're saying?

A. That's my recollection. And, as I said, if I could see the documents I might be able to [sic] from a more enlightened point of view.

Q. Then give me five minutes and let me see if I can find them. Okay?

A. Sure.

[102] MR. STYER: Off the record.

(At this time a brief recess was taken after which the testimony continued as follows:)

MR. STYER: Mark this as Adams-2.

(At this time the court reporter marked the exhibit as Adams-2).

BY MR. STYER:

Q. Mr. Adams, I've shown what we've marked as Adams-2. We were talking about the application that was submitted by Mary Ann Rossi on behalf of Thornbury Noble. Given to you is Adams-2, a five-paged document with a cover letter, next is Application for Amended Final Plan or, in the Alternative, for A Zoning Map Amendment, and then there's an Act 247 County Referral.

A. Right.

Q. Now, that's the application that was submitted by Ms. Rossi, correct?

A. That's the one I was referring to that I couldn't recall explicitly how it was captioned and what relief it requested. It was submitted about a month prior to the November 3rd [103] meeting that you were just talking to me about.

Q. And it also had with it – you had mentioned and obviously I didn't make copies – there were two envelopes that had plans with them.

A. That's right.

MR. BELLWOAR: Exhibits A and B, I think they're referenced.

MR. STYER: Correct.

BY MR. STYER:

Q. This application was accepted by the Township, correct?

A. I believe so.

Q. And it was referred to the Chester County Planning Commission as well.

A. Well, I can see that a referral form accompanied it. I don't know if it actually was referred or I don't know if any fees were paid with this submission.

Q. Well, there is a – I'll represent to you that there is a recommendation by the Chester County Planning Commission that references that.

A. Okay.

[104] Q. So does that help you –

A. Yeah. I assume the Township referred it. That's what this form is for, the Act 247 County Referral Form.

Q. Earlier you had talked about that there was no formal application filed. Does this change your view that there was an application filed in fact?

A. My opinion is that this is still not a formal land development application. I think Mary Ann Rossi was still testing the waters, trying to find out if the Board would approve the rezoning. This is called an Application for Amended Final Plan Approval or, in the Alternative, a Zoning Map Amendment. Clearly the alternative relief is what she wanted. The application for Final Plan Approval is depicted in Exhibit A in one of those envelopes.

I think if you look at that you're going to see that it's simply a sketch plan, which is not a formal submission, which would have normally been required for any kind of plan amendment.

Q. I'm sorry. You were saying that it [105] would have been required for an amendment? What would have been required for an amendment?

A. I think Mary Ann Rossi submitted a sketch plan just to try once again to see if the Supervisors would consider the alternative relief of the zoning map amendment. And the reason – I don't know – do you have the plan –

Q. Yes.

A. – the Exhibit A plan, and then I can demonstrate what I what I think is the case.

Q. I don't know that there's any dispute that this is a sketch plan.

A. Right. Well, I can tell you that the Supervisors would not be in a position to grant any kind of approval based upon a submission of this quality.

MR. BELLWOAR: And you're referencing Exhibit A of the October 6th submission by Mary Ann Rossi.

THE WITNESS: Right. It's called Sketch II and it's Exhibit A. And I think it's submitted simply to demonstrate that the property could be developed under the present zoning configuration – the then [106] present zoning configuration – with a 50,000 square foot food store.

I'm not sure that was ever demonstrated to the Township and I expect that's why Mr. MacDonnell said: Take it to the Planning Commission.

BY MR. STYER:

Q. Obviously the Township did not reject the plan that was submitted, correct?

A. In my view there was no legal submission. It did not take action on this application to my knowledge. And Mary Ann Rossi never claimed any deemed approval or other rights as a consequence of our failure to adopt this plan. And we never had a hearing on the proposed rezoning which was her alternative relief.

Q. I'll get to that. There was no hearing though because the Board would not agree to a hearing, correct?

A. I believe the Board did not want to have a hearing on this because they weren't inclined to rezone it.

Q. And any request for a hearing or – well, there was a request for a hearing, correct?

[107] A. If that's what this application is, it does say in the Alternative for a Zoning Map Amendment. She

asked in the alternative that the Board approve an amendment to the final zoning to allow for a food store to rezone approximately two acres.

Q. And at the November 1998 meeting the Board stated that it was not inclined to grant the approval, correct, it was not going to grant the approval?

A. I'm not sure what the minutes say. Mary Ann obviously asked the Board at that meeting, according to the minutes, to reconsider its position on the rezoning. and I think she realized that she was – it was an uphill battle and she didn't press for the hearing.

Q. We'll get to this a little bit later, but am I correct that you took the position that this was not – what was proposed was not an amendment to the final plan?

MR. BELLWOAR: Are you saying what was proposed?

MR. STYER: What was proposed in the application.

[108] MR. BELLWOAR: Adams-2?

MR. STYER: Yes.

THE WITNESS: I considered it a new plan rather than an amendment. It's a matter of semantics, I guess, in one respect, but I considered it more than a simple amendment to an approved plan.

In any event, I don't consider the application to have been duly submitted as required by the Township. It was a sketch plan which doesn't require any action by the Supervisors. In other words, the submission of the sketch plan doesn't vest an applicant with any rights to approval.

May I add that she was free to submit a preliminary plan, a fully-engineered preliminary plan to depict the alternative of the food market on the property as it was then zoned, but that never occurred.

BY MR. STYER:

Q. That would have required a conditional use hearing, correct?

A. Well, it depends when she submitted

* * *

EXHIBIT 24

Yerkes

Yerkes Associates, Inc. Consulting Engineers/Landscape Architects/Surveyors

October 13, 1998

Thornbury Township
Planning Commission
8 Township Drive
Cheyney, Pennsylvania 19319

RE: The Commons At Thornbury-Thornbury Noble
Amended Final Plan Application Review

Dear Commission Members:

The following plans prepared by Edward B. Walsh and Associates, Inc. have been submitted to this office for review:

Sketch II-Exhibit 'A', Sheet 1 of 1, last revised March 11, 1998

Sketch Plan-Exhibit 'B', Sheet 1 of 1, dated March 11, 1998

The plans depict the construction of a 50,000 square foot food market building within the Commons At Thornbury commercial center on the southeast corner of the Routes 926 and 202 intersection. Exhibit "B" also depicts the construction of a 10,000 square foot drug store. The purpose of exhibit 'A' is to amend the final plan approved by the Township on March 7, 1995 to allow the construction of the food market building. The purpose of exhibit 'B' is to amend the approved final plan to allow the construction of a 50,000 square foot food market building and a 10,000 square foot drug store in conjunction with the

expansion of the B Business Zoning District east along Route 926 and south along, Route 202.

The following comments are offered for your consideration:

Exhibit "A"

Zoning Ordinance

1. *Section 155-37.C.(4)* – Along each side or rear property line which directly abuts a residence district in the Township there shall be a buffer planting strip not less than 50 feet in width. The buffer planting strip shall be a landscaped area free of structures, materials, and vehicular parking. The sketch plan should be revised to depict the buffer planting area and to relocate any encroachment into the buffer.

2. *Section 155-37.C(5)* – The Board of Supervisors may permit all or a portion of the buffer planting strip to be located within the abutting residence district where the abutting residential property is owned or controlled by the business district property owner. In the event that the Board of Supervisors permits the buffer planting strip to be so located, it shall require that appropriate perpetual easements and restrictions be placed upon that portion of the abutting residential property being used for the buffer planting strip. The Township should determine whether placement of the buffer planting strip within the abutting residential property is acceptable.

3. *Section 155-37.F* – The greatest dimension of a building shall not exceed 160 feet in length or depth. The maximum dimensions of the proposed food store building are 224 feet wide by 250 feet long. A special exception appears to be necessary to allow the dimensions of the proposed food market building.

4. *Section 155-39.D(1)* – No loading berth for vehicles of more than two-ton capacity shall be located less than 100 feet from any residential district. The proposed loading area location should be revised for compliance with this section.

5. *Section 155-39.D(3)* – Each loading berth shall be designed with appropriate means of vehicular access to an interior. drive in a manner which will least interfere with traffic movements:. A plan indicating truck traffic access and circulation should be included with the sketch plan submission:

6. *Section 155-39.E(2)* – The parking requirements table should be revised to account for the parking requirements associated with the existing beauty salon and the 20,000 square feet of the food market store not utilized for sales. Based on Section 155-39.E(2h) it appears that these uses require one parking space for each 200 square feet of floor area.

7. *Section 155-39.G* – Interior drives shall be designed so as to prevent blockage of vehicles entering or leaving the site. The Route 926 exit appears to provide sufficient length for only 4 or 5 vehicles staged in the left turn lane without blocking the driveway along the east side of the food market building. The Route 926 exit should be revised as necessary to allow a sufficiently long staging area.

8. *Sections 155-39.G(3) and (4)* – The location of a fire lane easement should be indicated on the plan. Fire lane easements shall have a minimum unobstructed right-of-way with of 40 feet and, for fire lane easements which curve, turn or change directions, shall provide a minimum turning radius of 55 feet.

Exhibit 'B'

Zoning Ordinance

9. (See Comment #1)

10. (See Comment #2)

11. (See Comment #3)

12. (See Comment #6)

13. (See Comment #8)

General Comments

14. It is recommended that an existing features plan indicating building setback lines, zoning boundaries, buffer planting areas, parking spaces, building coverage, and impervious coverage be included as part of the application.

15. Proposed zoning boundary lines should be added to sketch plan "B".

16. A conceptual stormwater management plan should be included with each sketch plan.

17. A traffic impact study may be necessary to determine if any modifications to the traffic signals at the Routes 202 and 926 intersection and the entrance at Route 926 are necessary.

The above comments must be satisfactorily addressed. during further development of either sketch plan. Please call if you have any questions.

Very truly yours,

YERKES ASSOCIATES, INC.

/s/ Michael Conrad
Michael Conrad, P.E.

MC/dmk
cc: Mahlon Rossiter
Mary Ann Rossi

EXHIBIT 25

THORNBURY TOWNSHIP, CHESTER COUNTY
PLANNING COMMISSION
MINUTES
OCTOBER 14, 1998

In attendance were Planning Commission (PC) members: John Stevenson (Vice-Chairman), Barbara Iacovelli (Secretary), Robert Eichnman [sic], Ray Heinzelmann, Michael Sweeney, Mahlon Rossiter (Township Manager), and Robert Adams, Esq. Township Solicitor. Also in attendance were Mike Conrad, Yerkes Associates, Mary Ann Rossi of Fox, Rothschild, O'Brien & Frankel, LLP, Allan Baumholtz, Owner, Thornbury Noble, and Ron Giacinto, Resident.

Mr. Stevenson called the meeting to order at 7:35 p.m. and led the Pledge of Allegiance.

Minutes Approval – The minutes were postponed until the November meeting.

Old Business –
Bridlewood Farm – Phase 4: The PC was presented with a sketch for Phase 4 and Mr. Rossiter stated that the PC has everything concerning this matter. He asked if the PC would consider a second session this month to review this sketch and that this sketch was a preliminary before the final of Phase 4 and that nothing had been changed. Mrs. Iacovelli suggested to have everything complete for the November agenda. Mr. Stevenson noted that November's meeting is on Veteran's Day and a request was made to change it to Thursday, November 12. Mrs. Coletta will poll the members and if all can attend, Mr. Rossiter will advertise the change.

New Business –

Thornbury Noble: Mary Ann Rossi presented two Unofficial Sketch plans for an Amended Final Plan. Exhibit A – which does not involve rezoning; and Exhibit B – which requires a zoning change. A 75 minute discussion followed, including the change in zoning, the approval needs from the township and comments from residents. Mrs. Rossi stated that her client is ready to go ahead with the final plan that has been approved and that the Burdich property has been acquired by Thornbury Noble to remain residential in order to prevent "commercial creep" along Rt. 926. Mrs. Iacovelli asked for clarification of the two residential lots east of the shopping center. Mrs. Rossi stated that of the two properties, the first house is in the plan and the second one (the Burdich property) is deed restricted. Mr. Stevenson noted that the first house is deed restricted property for on-site sewage only. Mrs. Rossi stated that they are still considering rezoning the residential property shown on the existing plan but the adjacent property would not be rezoned from its residential zoning and would restrict it from commercial use. Mr. Adams stated that the reason for the deed restriction is to protect it from future rezoning. Mrs. Rossi advised that the Burdich property is currently under lease as a residence. Mr. Eichman mentioned the detaining basin and retention wall, stating it is there to protect the land from deteriorating, to protect neighboring children, and it would also be a secured area with no infringement on the southern residential lot.

A discussion followed concerning the proposed drugstore, its position on the site and the possibility of turning it and screening it from the residential community. Mrs. Rossi indicated this would not be a problem and her client is

committed to screening. Mr. Stevenson asked if there would be a single or double drive-in lane for the drugstore, Mrs. Rossi replied there were plans for a single drive-in lane. Concerning the lot to the east, Mr. Stevenson stated there is parking space for about 30 cars; the drive around goes on to what is now the restricted area, the existing sewage field, thus the property has been encroached upon in two different ways – that is commercial use of a residential property. Mrs. Rossi stated there is enough setback, adjacent residential property is already allowed to be used for accessory support for this plan and there is a detention basis to support adjacent property. She stated that steps have been taken already to allow these two properties to be used as an accessory to a commercial property.

Mr. Stevenson stated that it was very concise how this property was to be used and so far the past owner has not complied with any of those restrictions. He stated that he wants everyone on the PC to be clear as to what these options show since Thornbury Noble will be looking for some sort of variance or exception to accomplish their plan. Mrs. Iacovelli asked for the difference between Exhibits A & B. Mrs. Rossi stated that the superior difference is the circulation. With Exhibit B you the entrance and the main building is on the left. Mr. Stevenson mentioned public sewer and Mr. Baumholtz said, "Public sewer is there now and everyday capacity requirement is probably the same as that approved for the strip shopping center already approved. Mrs. Rossi will get a list of options regarding sewage. Mrs. Iacovelli asked the amount of green space on Exhibit B and loading for the proposed grocery store. Mr. Baumholtz explained that the track

behind the building would be 25' before the Burdich line, then come to Rt. 926 and out.

Mr. Stevenson stated they have already added to the impervious plan for 1000' and questions what kind of assurances they would be giving the township that they would redesign the parking lot line, the retention basin and increase capacity of the detention basin. A discussion followed concerning the septic system. Mr. Stevenson stated that the ground water issue at the adjacent properties is at the forefront for resolving this system. Bridlewood was mentioned as a good example. Mr. Adams noted the supervisors do not like Exhibit A; he feels Exhibit B is better but could be improved; asked if Exhibit A could be done; but feels it is a waste of time since the BOS does not want to approve this one. Mr. Stevenson stated that regardless of which plan, all these issues that have to be resolved. Mrs. Rossi stated they would line the basin, satisfy Yerkes for storm water, etc., but they have to know which plan the township would consider in order to go forward and afterwards, the engineers would be involved. Mrs. Rossi stated her purpose in being here tonight, and at the BOS in November, is to see if rezoning would be allowed to permit her client to proceed. Mr. Stevenson stated these two exhibits are lopsided and he would prefer there be a better picture of Exhibit A.

Discussion followed along the same lines of rezoning the Burdich property and plans to protect it from commercial development. Mr. Adams stated if the client is not concerned about the sewer then probably the property would be used for parking. Mrs. Iacovelli stated that in her opinion, the Burdich property cannot be used for anything except a tile field and the setback for the grocery store is to be 50' – in other words, parking *goes* in Exhibit A. Mrs.

Rossi asked Ron Giacinto to comment on the pros and cons of the two plans from his perspective and that of his neighbors. Mr. Giacinto discussed the plans and the effect on his neighborhood. Mr. Eichman stated he wants the detention basin done properly and maintained properly. Secondly, he questions why a drugstore could not be worked into Plan A. Mrs. Iacovelli asked how these two plans gel with our impervious surface specifications.

Mr. Stevenson asked Mrs. Rossi what would be helpful at this point and Mrs. Rossi stated that it would be helpful to have a vote from the PC. Mr. Stevenson stated that the Burdich property is part of this and no matter which plan you go with, it gets deed restricted. Secondly, stay out of the existing residential property that already has the sewage on it. Thirdly, if you turn the store 90 degrees and still have the side loading on the east side and keep the berms, load off the end, it solves a myriad of problems, but you lose the drugstore. Also, he would like to see another plan that expresses the desires of the BOS, one that would be a better compromise. Mr. Adams stated he doesn't like Plan A and there are problems with it concerning compliance but before Mrs. Rossi goes before the BOS, an alternative plan might help. He further stated that from a planning perspective, Plan B is better, but the BOS' objection had to do with the traffic, the idea of bridging the line that is residential. Mrs. Rossi stated there is no reason to offer anything on Burdich since an Exhibit A can be engineered to comply with existing ordinances, the Burdich property would only be retained to secure rezoning, and if there is a Plan C, it will not include the Burdich property. Mr. Stevenson stated that would not be much of an incentive for the township.

Mr. Stevenson requested comments from the PC. Mr. Conrad stated that the problem seems to be access off Street Road and that the entrance off Rt.202 would provide better access for truck delivery. Mr. Adams stated it goes a long way to discuss the Rt. 926 entrance. Mr. Sweeney stated that he would like to see a great Plan A; he prefers Plan B but would like to see a credible exhibit of Plan A. Even then, he feels he would probably still lean toward Plan B. Mr. Adams stated it was more important to come up with a compromising Plan A. Mr. Eichman stated he agrees 99% with Mr. Sweeney but if possible, would prefer Plan B. Mrs. Iacovelli stated she was offended by the appearance of the two plans – one being green and the other, not green, but appreciative that Mrs. Rossi was here to present a sketch. She also stated that the PC wants the best, most viable use for this corner – the PC wants it to survive. However, it is to be buffered, well planted and under the zoning – fit it into the zoning – both plans A & B. If a combination plan is presented the PC will be happy to review it. Mr. Heinzelmann was in agreement with the other members and had nothing to add.

9:00 p.m. – BREAK – 5 MINUTES.

Old Business –
Gillespie Sketch Plan:

Mr. Rossiter noted that this was informational only and there was no representative at the meeting. Mrs. Iacovelli made a motion that the PC submit a letter to the Zoning Hearing Board for their meeting of October 26 on the Gillespie Sketch Plan, stating that the PC supports a three-

* * *

EXHIBIT 26

THORNBURY TOWNSHIP, CHESTER COUNTY
BOARD OF SUPERVISORS
AGENDA

NOVEMBER 3, 1998

1. Call Meeting to Order – 7:30 P.M.
2. Minutes Approval of Meeting held October 20, 1998
3. Ordinance 1998-4 – Amending Chapter 155, Zoning by Changing Currently Zoned "A" Agricultural & Residential to the "B" Business District 19+/- Acres (Faucett Tract)
4. Birmingham Devco (Faucett Tract) Decision
5. Greens at Penn Oaks – David Linahan
   (A) Sewage Treatment Plant – Operations & Maintenance
   (B) Final Escrow Release for Sewer Plant
6. Thornbury Noble – Mary Ann Rossi
7. Resolution 1998-16 PennDOT Winter Traffic 5 Year Service Contract
8. Firemen's Relief Distribution
9. Treasurer's Report & Bill List Approval
10. Brandywine at Thornbury – Six Escrow Releases for: Phases 1, 3B and 7
11. Springhouse at Brandywine – Escrow Release #6
12. Public Comment
13. Adjournment

UPCOMING MEETINGS:

November 4, 1998 at 7:30 P.M. –	Park & Recreation Commission
November 9, 1998 at 7:30 P.M. –	Historic Preservation Commission
November 10, 1998 at 7:30 P.M.	Task Force
November 12,1998 at 7:30 P.M. –	Planning Commission
November 17,1998 at 7:30 P.M. –	Board of Supervisor

In attendance were Supervisors: Charles A. W. Wilson (Chairman), J. Christopher Lang (Vice Chairman), Patricia M. Dewey, Robert A. MacDonnell and William A. Schmidt; Robert Adams (Solicitor), David Linahan (Yerkes Associates – YA), Ronald Miller and Robert Eichman (PC).

Mr. Wilson announced that the Board was going into Executive Session with the Solicitor. Mr. Wilson called the meeting to order at 7:58 P.M. and led the Pledge of Allegiance.

Minutes Approval – A motion was made, seconded (PD/WS) and carried to approve the minutes of meeting held October 20, 1998. Mr. Lang abstained due to his absence from the meeting.

Ordinance 1998-4 – Amending Chapter 155 Zoning
Mr. Wilson stated that the Ordinance has been advertised and presented a copy of the proof of publication. This Ordinance amends Chapter 155 Zoning by changing the currently zoned 19.9 acres located at the north/east corner of Route 202 and Dilworthtown Road from "A" Agricultural and Residential to "B" Business District. Mr. Lang recommended adding specific conditions and wording prior to adopting the Ordinance. A motion was made, seconded (RM/PD) and carried to adopt Ordinance 1998-4. Mr. Lang abstained.

Birmingham Devco (Faucett Tract) Decision
Randall Schauer, Esq., Kevin Lahn and Robert J. Waters (Applicant) were present on behalf of the Faucett tract.

Mr. Wilson stated that the Board has a Decision before them based upon the applicant's filing for a conditional use to develop a neighborhood shopping center at the n/e corner of Route 202 and Dilworthtown Road. Mr. Lang questioned Item 11, *"Right-of-Way"* that stipulates a 30' right-of-way. Mr. Lang recommended a 50' right-of-way. Mr. Adams noted that the proposed road is not intended to be a full service public road. The road will allow a connection between the adjoining property to the north (Stoltzfus propery [sic]) and Dilworthtown Road. Mr. Schauer commented that the PC recommended a 30' right-of-way. Mr. Lang motioned to change the 30' right-of-way to 50'. Motion failed for lack of a second. Mr. Adams stated that Fronefield Crawford (Attorney for the Iacobucci Organization) faxed a letter dated 11/03/98 requesting that the right-of-way not traverse the area of the property east of the shopping center. Mr. Adams informed Mr. Crawford that the Board has deferred the right-of-way decision until viewing an engineered preliminary plan.

Raymond Iacobucci and Francis Iacobucci were present on behalf of the Greens at Penn Oaks Golf Course. R. Iacobucci stated he is not opposed to the road, but does not want it located in the buffer area because it would have a detrimental effect on the golf course. Mr. Iacobucci asked that the Board consider Mr. Crawford's request to keep the right-of-way west of the buildings. Mr. Wilson responded that the Board prefers to keep options open until there is a land development plan. Mr. Lang stated that the Decision did not incorporate his request to document the historic structures in Birmingham Township. Mr. Lang asked that

the structures be documented through archival architectural photographs and plans recording the basic dimensions of the structures. Mr. Schauer agreed and stated that copies of the historic structures documentation will be filed with both Birmingham Township and Thornbury Township (TT). Mr. Adams told the Board that he will add Condition 24 under "*Open Space*" for Historic Preservation. Mr. Adams recommended execution of the Decision at the Supervisors meeting on November 17th after Condition 24 is incorporated.

Brandywine at Thornbury (BT) Sewage Treatment Plant

Mr. Wilson asked Mr. Linahan to comment on a letter from Elizabeth Hurtubise, K. Hovnanian's attorney. Mrs. Hurtubise stated that Bozzuto has moved 18 residents into the apartment complex. Mrs. Hurtubise claimed BT was never notified that there would be additional sewage flow and as a result the tanks overflowed, in addition BT never had an opportunity to inspect sewer lines to make sure they were free of debris. Mrs. Hurtubise stated that BT and Bozzuto are having difficulty in agreeing on a sewer rate. Mrs. Hurtubise requested that TT issue no more Use & Occupancy Permits to Bozzuto until their issues are resolved. Mr. Linahan stated that BT's sewage treatment plant was switched on this morning. All the approvals were received to start up the plant. There is no reason to limit occupancy permits to Bozzuto with the plant on line. Pump and haul is a different situation because BT was exceeding what they were permitted to pump. Pump and haul was discontinued today. Mr. Linahan recommended that TT wait a year before taking dedication of the plant to better determine the cost of operating and maintaining the plant. Mr. Adams told the Board that he will write Mrs.

Hurtubise stating that (1) the overflow problem is a moot issue now that the treatment plant is on-line, (2) the sewer lines are obviously free of debris due to start-up of the plant and (3) the Township will not withhold Bozzuto's permits. TT has no basis to stop issuing permits to Bozzuto, the dispute is between Hovnanian and Bozzuto.

Greens at Penn Oaks (GPO) Treatment Plant

Mr. Linahan informed the Board that YA has made arrangements to get plant up and running. YA is recommending an escrow release of all but $100,000 to cover the first year's operation. The developer asked YA to operate the plant for six months and develop a routine. YA has agreed to oversee plant's operation and will bill GPO directly. After six months it is the developer's intention to turn the plant over to the Homeowners Association. Mr. Linahan noted that if the Township wants to take over the facility the HOA could manage it under township supervision. A motion was made, seconded (RM/WS) and unanimously carried to release $128,558. The total released to date is $698,148 and represents 87% of the project security with $100,000 remaining.

Thornbury Noble (TN)

Mary Ann Rossi (Attorney) and Adam Browler (Engineer) were present representing the applicant Allan Baumholtz.

Mrs. Rossi told the Board that after the PC meeting the applicant thought it feasible to amend the already approved final plan to actually build the supermarket, but the applicant believes a better plan and layout could be achieved by rezoning the 2 residential acres. Before TN starts engineering, TN is asking the Board to reconsider its position on rezoning. If the Supervisors agree, TN requests that the Board authorize a Hearing by advertising for the

rezoning. Mrs. Rossi presented two plans to the Board, one plan showing the market on the existing commercial site and a second plan with the 2 acre rezoning. Mr. MacDonnell recommended that the applicant go back to the PC and go through the regular land development process. Mrs. Rossi informed the Board that the posted rendering has been revised from the plan presented to the PC. The PC stated they want a credible alternative. Mr. Adams commented that the PC looked at both alternatives and requested the applicant to come up with a plan that can be developed as a shopping center. Mrs. Rossi asked if there was any support for rezoning the two acres. The site is going to have a supermarket, the applicant thought the Board might consider rezoning for better access and circulation. There was no support from the Board for rezoning at the July 7th meeting. If the PC recommends rezoning the site, will the Board consider it. Mr. Lang stated that unless the applicant can convince the Township there is a compelling benefit to rezone, the applicant would be unsuccessful. The Commons went from 4 commercial acres to 11 acres. The applicant is now requesting that the adjacent 2 acre residential property that was purchased for a buffer be rezoned to commercial. Mrs. Rossi asked if she is wasting her client's time. Mr. MacDonnell responded that the Board is not in favor of rezoning the property.

Resolution 1998-16 PennDOT Winter Traffic 5 Year Service Contract

A motion was made, seconded (WS/RM) and unanimously carried for TT to execute the Resolution 1998-16 and Contract with PennDOT for Westtown-Thornton Road in the amount of $1212.10.

Volunteer Firemen's Relief Distribution
Mr. Wilson noted that the Fire Marshal suggested a minor percentage change. The Board agreed to make the same percentage distribution as in 1997 and re-evaluate the distribution in 1999. A motion was made, seconded (WS/PD) and unanimously carried to distribute $12,566.21 as follows:

West Chester Firemen's Relief Association	(50%)	$6,283.36
Good Fellowship Relief Association	(20%)	$2,513.34
Concordville Fire Company Relief Association	(20%)	$2,513.34
Goshen Volunteer Relief Association	(10%)	$1,256.67

Treasurer's Report, Financial Statement & Bill List
A motion was made, seconded (CW/PD) and unanimously carried to approve the reports.

Township Park Improvements
There was a discussion regarding the timetable for completing the park improvements. Effective October 23, 1998 Lechmanik, Inc. must pay a $100 per day late penalty fee. Mr. MacDonnell stated if Lechmanik is granted an extension the penalty should be increased to $500/day. A motion was made, seconded (RM/WS) and unanimously carried that extension of the completion date be negotiated by Thomas Comitta and Mahlon Rossiter and that the penalty be increased to $500/day if the timetable is not met.

Brandywine at Thornbury – Escrow Releases
YA recommended approval and release of six escrow releases for BT as follows:

Route 202 & 926 Improvements, Release #1 contingent upon written approval from PennDOT
Phase 1 Escrow Release #1 in the amount of $3,743,357.30
Phase 3B Escrow Release #1 in the amount of $ 198,625.78

Phase 7	Escrow Release #1 in the amount of $	238,718.40
Phase 7	Escrow Release #1 in the amount of $	79,125.00

A motion was made, seconded (RM/WS) and carried to approve the escrow releases for BT. Mr. Lang abstained.

Springhouse at Brandywine – Escrow Release

YA recommended approval and release of Escrow Release #6 in the amount of $274,956.25. The total released to date is $892,854.35. This represents 74% of the project security with $313,045.65 remaining. A motion was made, seconded (RM/PD) and unanimously carried to approve the release.

Public Comment

Ronald Giacinto told the Board at the July 7, 1998 meeting they agreed to look at Mr. Baumholtz's plan with an open mind. Mr. Adams responded that the plan was not viable. Mr. Giacinto asked if the applicant engineers a 40,000+ s.f. supermarket that meets ordinance regulations is Mr. Baumholtz entitled for approval. If the applicant builds a supermarket without the rezoning, it will have a worse impact on the neighbors. It was noted that the rezoning would provide 25' more buffer area between Mr. Giacinto's property and the commercial site. Mr. Giacinto told the Board that the applicant is trying to show good faith and has paved Mr. Eichman's driveway. This was supposed to be done by Mr. Acciavatti 10 years ago. Mr. Giacinto further stated that the 2 acre buffer was never deed restricted by Mr. Acciavatti. Mr. Giacinto asked if Mr. Baumholtz prepares a fully engineered plan for presentation to the PC, and if the PC recommends the plan would the Board look at it open minded. Mr. Giacinto inquired why was the Board so amiable to rezoning the Faucett tract from residential to business. Mr. MacDonnell responded that the Faucett tract was surrounded by commercial. Mr.

MacDonnell suggested doing something reasonable with the property. Mrs. Dewey responded that a 48,000 s.f. supermarket does not have to be built, an alternative such as a Fresh Fields Market could be supported. Michael Aiello and Richard Crosley of Thornbury Estates expressed concern about buffering between the commercial area and their properties. Messrs. Aiello and Crosley were assured that the ordinance provides for buffering and screening.

Adjournment

A motion was made, seconded (PD/WS) and unanimously carried to adjourn at 10:00 p.m.

Respectfully submitted

/s/ Constance Dulin
Constance Dulin
Township Secretary

EXHIBIT 27

[LOGO] FOX, ROTHSCHILD, O'BRIEN & FRANKEL, LLP

ATTORNEYS AT LAW FOUNDED 1907

[Name And Address Omitted In Printing]

January 11, 1999

Robert F. Adams, Esquire
Gawthrop, Greenwood & Halsted, P.C.
119 North High Street
P.O. Box 562
West Chester, PA 19381-0562

RE: Thornbury Commons

Dear Bob:

I am writing to state my client's position with regard to the status of approvals on the referenced property. Specifically, on October 6, 1998, I submitted an application for an amended final plan or, in the alternative, for a rezoning. The Board of Supervisors made it very clear to me and my client that a rezoning will not be approved. Accordingly, we wish to proceed with an amended final plan. We will shortly submit a revision to the amended plan submitted on October 6, 1998. That plan shows an approximately 49,000 square foot grocery store on the property. We are scheduled to review the plan in sketch with the Planning Commission on January 13, 1999.

You and I had discussed briefly whether this is a new application or a revision to an approved site plan. It is my position that this is a revision to an approved site plan. The grocery store will be constructed pursuant to the provisions of the B-Business District. While the recently enacted amendments to the Zoning Ordinance alter certain requirements for a "shopping center", and while

this property may meet the definition of a "shopping center", we are proposing to comply with the requirements generally applicable to the B-Business District.

The instant plan does not alter the already installed public and quasi-public improvements. It is simply an amendment to alter the configuration of the building as shown on the approved plan. The use proposed is permitted in the B-Business District.

Based on the foregoing, I request that the Township move forward on the application for an amended final plan that was submitted in October of 1998 as the same will be amended by submission of a revised plan. Please advise if the Township will require a different procedure.

Thank you for your attention to this request.

Sincerely,

/s/ Mary Ann
Mary Ann Rossi

mar

cc: Allan P. Baumholtz, SRPA
Paul Bonvicino, AIA

EXHIBIT 28

LAW OFFICES
GAWTHROP, GREENWOOD & HALSTED
A PROFESSIONAL CORPORATION
119 NORTH HIGH STREET
POST OFFICE BOX 562
WEST CHESTER, PENNSYLVANIA 19381-0562

[Names And Phone Numbers Omitted In Printing]

February 3, 1999

Mary Ann Rossi, Esquire
760 Constitution Drive
Exton, PA 19341-0673

Re: **Thornbury Commons**

Dear Mary Ann:

I am writing in response to your letter of January 11, 1999 in which you stated your client's position regarding the status of approvals on the Thornbury Commons property. In short, the Township's position is as follows: Since your client does not propose to construct the shopping center in accordance with the approved final plan, Section 508(4)(iv) of the Municipalities Planning Code does not, in my opinion, insulate the approved plan from the application of subsequently enacted zoning amendments. Very clearly, that section protects the developer's right against modification or revocation of any aspect of the *approved final plat* pertaining to zoning classification or density, lot, building, street or utility location. The plan which is proposed to be submitted changes density and building location at the very least, and it is my opinion that your client is not protected by Section 508(4)(iv) to the extent that he proposes to submit a plan containing the degree of modification which now appears.

The rationale for the Township's position is that this is a new land development plan for a shopping center over 30,000 square feet. The application is subject to the provisions of §155-35.B.(1) of the Zoning Ordinance, in that it requires a conditional use in accordance with the procedures and standards set forth in §155-82.1. The introduction of a 50,000-square foot food store has the potential of creating substantial impact upon the community which is best evaluated through the conditional use process. Only when a conditional use approval for the shopping center in the form presently proposed has been approved will the Township entertain consideration of a land development plan therefor. I will be happy to discuss this matter further with you, should you have any questions or comments.

Very truly yours,

/s/ Robert F. Adams
Robert F. Adams

RFA/cb

pc: Mahlon Rossiter
W/Enclosure

EXHIBIT 29

THORNBURY TOWNSHIP, CHESTER COUNTY
PLANNING COMMISSION MEETING
JANUARY 13, 1999
AGENDA

1. Call to Order
2. Pledge to the Flag
3. Planning Commission Reorganization
4. Minutes Approval – December 9, 1999
5. Old Business
   A. Gleichert Final Plan – Submitted January 13, 1999
      Preliminary Plan approved with Conditions 12/15/98 by BOS
   B. Gillespie Final Plan – Expires March 9, 1999
      (1) Chester County Planning Commission Review Letter dated 12/23/98
      (2) Chester County Conservation District Review Letter dated 12/21/98
   C. Thornbury Noble – Proposal for Construction of a SuperFresh – M. Rossi
6. New Business
   A. Brandywine at Thornbury Phase 9 – Child Care Learning Center Plan Submitted January 13, 1999
7. Other Business
   A. Ordinance Review
8. Announcements

   Joint Board of Supervisors and Planning Commission Meeting – Thursday, January 28, 1999 at 7:30 P.M.

9. Public Discussion

10. Adjournment

Next Scheduled Planning Commission Meeting – February 10, 1999

In attendance were Planning Commission (PC) members: Ronald Miller (President), Barbara Iacovelli (Secretary), Robert Eichman, Ray Heinzelmann, Frank Speidel, John Stevenson, Michael Sweeney, and Mahlon Rossiter, Township Manager, Andy Rau, Solicitor, Mike Conrad, Yerkes.

Mr. Miller called the meeting to order at 7:35 p.m. and led the Pledge of Allegiance.

PC REORGANIZATION – Chairman: Mr. Miller was nominated by Mr. Eichman, seconded by Dr. Speidel, unanimously accepted by PC. Vice Chairman: Mrs. Iacovelli was nominated by Mr. Eichman, seconded by Mr. Sweeney, unanimously accepted by PC. Secretary: Mr. Eichman was nominated by Mr. Stevenson, seconded by Mr. Heinzelmann, unanimously accepted by PC. Recording Secretary: Mrs. Coletta was nominated by Mr. Stevenson, seconded by Mr. Eichman, unanimously accepted by PC.

Minutes Approval – November 12th minutes will be amended and resubmitted in February. December 9th minutes will have Mr. Miller's 12/14 letter concerning Gleichert attached to minutes, unanimously approved with Mr. Stevenson abstaining since he was absent.

Old Business –

Gleichert Preliminary Plan: Feone Crawford: 1) moved lot line between lots 2 & 3 – dog leg drastically shortened. 2) Added note on tree removal – will "snake" the driveway

to avoid. Discussion followed about a large oak tree in the driveway area. 3) Mike Conrad questioned ultimate row on 926 – existing well on lot 3 – prove CCHD approval when actual wells are dug. 4) Mr. Eichman asked about 926/driveway – changed to easement on lot 1 to 50', cartway to 14' extending back to the first branch of the driveway. Easement shall be noted on deed for lot 1 to benefit lots 2 & 3. Mr. Eichman and Mr. Stevenson reiterated that 14' is not enough; 25' would be better. Mr. Conrad stated the flare of the 14' will go to approximately 18' wide at edge of 926.

Gleichert Vote – Conditions:

1. Yerkes letters dated 9/2/98 and 1/12/99
2. PennDot letter dated 10/20/98
3. PC letter of Conditions dated 12/14/98
4. The driveway shall have a minimum entering radius of 10' and be paved to a 24' width for a distance of 50' back from the southern cartway edge of 926 and be approved by PennDot and Township engineer.
5. To save trees – 12' caliper or larger and the Township Engineer shall provide on-site approval of the final driveway layout.

Mrs. Iacovelli moved to approve the Gleichert subdivision with the above conditions, Mr. Stevenson seconded, unanimously approved by PC.

Gillespie Subdivision Final Plan: Stephen B. Woodward, Engineer – notes a zoning problem (Sect. 115-47D) requiring no more than 10% slope in row. The drive up to the 2nd house has 12% slope. Mr. Conrad (Sect. 115-63A) – remaining drive shall not be more than 10% – Mr. Rau stated that 115-63 is clear. Mr. Stevenson questioned deed notations concerning the common driveway. Language

should be written requiring joint maintenance but not joint culpability for destruction by abuse and/or accidents. Mr. Eichman suggested lowering the house to bring the drive to 10% which then Mr. Woodward expressed concern about the backyard slope. Mr.Stevenson doesn't mind the 12% as much as the 9' width and suggested making it 12' width. Mr. Sweeney agreed with Mr. Stevenson. Dr. Speidel agreed also but wondered if the PC can require widening . Mr. Woodward suggested 4' of flat shoulder added to downhill side. Mr. Eichman likes the shoulder but still wants the drive wider. Mr. Heinzelmann agreed. Mr. Miller wants it wider and asked for a pull-off. Mr. Rau agreed that pull-off can be a condition. The PC complimented Mr. Woodward on the improvements already made and asked him to review the driveway. They will be back in February.

Recess – 9:50-9:55

Brandywine at Thornbury – Phase 4: Mary Ann Rossi presentation. Mrs. Rossi related that the BOS will not approve rezoning any property along Rt. 926. Therefore, the new plan presented tonight will be submitted as a Final Plan – clock starting at submittal as a Revised Final Plan (from the originally approved plan). Andy Rau reserved judgment until hearing revisions. Discussion continued but Mr. Stevenson stated perhaps this could be deferred to the March meeting but the applicant prefers February and Mrs. Rossi feels this is a legal opinion. Approved plan has 38,000 sq. ft. plus 10,000 sq. ft. building coverage and the revised plan has 49,000 sq. ft. plus 10,000 sq. ft. building coverage. Changes: *Original* – one 38,700 sq. ft. building plus 10,000 sq. ft. building with no specified use, assumed to be multi-user. *New* – Rearranging the buildings, adding approximately 1100 sq. ft. and

specifically identifying the uses. The only buildings will be the two existing and the new A&P – 3 buildings total.

Mr. Paul Bonvicino of A&P described the proposal: A full service grocery store with drugs and flowers – 49,973 sq.ft. They have not changed access, there are 351 parking spaces; the shape of the building has been changed to rectangle instead of L-shaped; 125-150 employees; landscaped the 50' buffer to residential area; loading docks are sealed so there is closed loading and it is more quiet; there are no outdoor dumpsters; all loading is to the rear, east side of the building; building will be 35' high; all 4 sides of the building will be faced.

Mr. Stevenson questioned access – 90% of the traffic will come from Rt. 926 with a 24' entrance. Mr. Baumholtz (landowner) replied that 24' is more than enough. Discussion followed on traffic trips and flows from Rt. 926. Mr. Baumholtz said a traffic study will be submitted with the plan. They proposed 2-4 tractor trailers per day. The docks can handle 3 trucks per day, also, 12-15 step vans; the bays all face Rt. 926. Mr. Sweeney, Mr. Heinzelmann and Dr. Speidel had no comment. Mr. Stevenson asked if it would tie in to public sewer – Mrs. Rossi stated possibly with Westtown and West Goshen. Mr. Eichman added nothing further; Mrs. Iacovelli stated the PC will look at certain issues but speaking for herself, believes that this plan ban be reviewed as a Revised Final Plan with the caveat that the PC may need extensions of the time clock for review. Mr. Miller is concerned about traffic, parking, and the review time. The plan should be submitted well enough in advance to give the township consultants sufficient review time. Mrs. Rossi will submit a letter listing the changes. Mr. Miller also asked for line of sight views from Rt. 926 and Rt. 202. The PC endorses public

water & sewer. Mrs. Iacovelli asked for impervious surface percentages. Mr. Stevenson discussed the stormwater basin and reminded Mrs. Rossi and Mr. Baumholtz that those issues will be addressed and reviewed also. He thanked Mr. Baumholtz for filing in the old construction sites. Mr. Stevenson also asked for a report on the eskrow account. Mr. Eichman noted detention basin maintenance in the future. Mr. Rossiter asked about signage – are special requests needed? Mike Conrad talked about Rt. 202 entrance and island placement – Mr. Baumholtz does *not* want trucks entering from 202 – and truck queuing and loading bays. Mike also wants to know the plans for current sewage field area and green space coverage.

Ron Giacinto, neighbor stated he felt the plan was "fair" in his estimation. His problem is that the BOS should allow the next lot to be rezoned so the building could be moved back for better access. It seems this is similar to an old plan which Chester County did not like with a short access way. Ron wants the PC to ask for the expansion from the BOS. Mrs. Rossi stated that the Board was emphatically against expansion. Discussion followed about accepting this plan or is there another viable plan. Mr. Stevenson moved to table this discussion until we find out its status, Mrs. Iacovelli seconded, unanimously approved.

New Business –

Brandywine at Thornbury, Phase 9 – Commercial Area: Mark Mayhew, of Taylor, Wiseman & Taylor, outlined the plan for Children's World Learning Center. This will consist of one single story building 2 play areas and a 4' high chain line fence surrounding the site with internal access from Paddock Lane only.

Mike Conrad discussed his Letter of Review received at tonight's meeting, dated 1/13/99 and asked Andy Rau if this should be reviewed under PRD or BI-Business district restrictions. Andy feels it should be under PRD, but BI for some specifics for area and bulk specs, etc. Mr. Miller and Mr. Stevenson agreed. Mr. Miller asked the PC for its opinion – all said they didn't have a problem with a combined, open, review of the Plan. It might work a lot better than locking into only one 20 section. Mr. Heinzelmann was not against this use but remembered that the original plan for the commercial center was to have retail so people didn't have to cross Rt. 202 to shop. Mr. Stevenson agreed and hopes eventually, there will be a pedestrian walkway across Rt. 202. Mrs. Iacovelli had no problem combining the zoning and asked if this was all the commercial. Mrs. Rossi answered, "Yes." Mr. Miller clarified that this was a Final Plan – and the clock starts tonight. Mr. Stevenson questioned the single entrance and suggested doubling it. Mrs. Iacovelli agreed, stating it needs a drop-off loop. Mr. Finnimore, school representative from Aramark, states that they require no drop-off since parents park and get out of their cars with their children.

Mrs. Iacovelli feels this is unsafe and strongly suggested a drop-off lane instead. There are 180 children, ranging in age from infants through "before and after school programs" – usually up to 9-10 year-olds, and 20 staff members. Mr. Heinzelmann asked re, school buses; John Finnemore stated that a van bus will pick them up at the schools and drop them off. Mr. Miller stated the facility should be screened along Martingale Road and the apartments; Mark stated that it will be fully planted with evergreens. Mr. Stevenson suggested hooded, downcast lights; Mark stated that four 12' street lights, wall packs

and flood lights will be down lighted. Mr. Fennimore stated usual hours are five days a week – 6:00 am.-7:30 p.m. The building will be all brick, pitched roof. The Design Review Committee will review the building layout. Mr. Fennimore stated their goal is to be under construction April 1st. Mark listed changes from strict B-1 District requirements, using 9x18 parking stalls instead of 9-1/2x18; parking in front; 35 stalls – 1/319; proposing less than 2' candles on lights; no 50' buffer to the north abutting the apartments. Mr. Miller reviewed possible conditions for approval as follows:

1) Parking lot – ample parking, drop-off flow, one way access.

2) Emergency access.

3) Additional screening along Martingale and east side of property.

4) Lighting – placement, shading not cast beyond property.

5) Yerkes letter dated 1/13/99.

6) Chester Co. Health

7) Fire Marshall

8) Tom Committa review on landscape.

9) Fence height

10) HOA agreement to be reviewed by Andy Rau.

This parcel is part of the Homeowner Association – property owner is responsible for maintenance of building and landscaping. The center will be open to the public.

Other Business –

Ordinance Review: PC discussed Mr. Miller's draft of 20 changes. Mrs. Iacovelli moved to approve, Mr. Sweeney seconded, unanimously approved to go to the BOS.

PRD Apartment Lights: Mr. Eichman and Mr. Stevenson mentioned the height and glare of apartment section lights and feel they are not correct, approved lights. Mrs. Iacovelli moved, Mr. Stevenson seconded, with unanimous approval for Mr. Miller to ask Andy Rau and Mike Conrad to check the lights and if they are not the proper, approved ones, report this to the BOS.

Meeting adjourned: Mr. Heinzelmann moved, Mr. Stevenson seconded, all approved, meeting adjourned at 11:30 p.m.

Respectfully Submitted,

Barbara Iacovelli, Secretary

[Attendance Sheet signed by one person Omitted in printing.]

EXHIBIT 30

THORNBURY TOWNSHIP, CHESTER COUNTY
BOARD OF SUPERVISORS
JANUARY 19, 1999

In attendance were Supervisors: Patricia M. Dewey (Chairperson), J. Christopher Lang (Vice Chairperson), Robert A. MacDonnell and Charles A. W. Wilson; Mahlon Rossiter (Twp. Manager); and Ronald Miller (Planning Commission – PC).

Minutes Approval

A motion was made, seconded (CW/RM) and carried to approve the minutes of the reorganization meeting and regular meeting held January 4, 1999.

Brandywine at Thornbury (BT) – Sewage Treatment Plant Purchase Proposal

Mrs. Dewey referred to a letter dated January 4, 1999 from Elizabeth Hurtubise, attorney, for K. Hovnanian. Mrs. Hurtubise informed Thornbury Township (TT) that Hovnanian has received a written offer from Aqua Source to purchase the sewage treatment plant at BT. According to the Final Sewage Facilities Agreement TT has 60 days to accept dedication of the plant. Mrs. Dewey stated that the Township is waiting for letters from the Solicitor and Township Engineer regarding Hovnanian's proposal. The Board recommended that this item be tabled until the February 2, 1999 meeting.

Gleichert Final Plan

Fronefield Crawford, Esq. was present on behalf of the Robert Gleichert Subdivision. Mr. Crawford stated there was an issue at the January 4, 1999 meeting regarding the tail from lot 2 into lot 3 that has been addressed in the final plan. Lots 2 and 3 include the dogleg within the gross area. Another issue is widening the driveway entrance. The applicant has applied to PennDOT for a road occupancy permit. The state requested a 10' radius for flares to provide adequate site distance. The PC recommended that the driveway be 24' wide. The applicant believes 14' is appropriate for safety and does not wish to create additional impervious surface that will cause more storm water run-off and aesthetic problems. The third issue concerned using the existing well on Lot 3 as a test well. Mr. Crawford stated that 5 gallons a minute in a 24 hour draw down test is deemed appropriate for a 3-lot subdivision by the County Health Department. If the applicant cannot meet the 5 gallons per minute requirement a new well will be drilled. Mrs. Dewey read a memorandum dated January 19, 1999 from Ronald Miller itemizing the PC's five conditions of approval. The PC voted to recommend that the Board approve the Gleichert plan subject to the following:

1. That the concerns raised in the Yerkes letters dated September 21, 1998 and January 12, 1999 be satisfied with the approval of the Township Engineer.

2. That the recommendations in the PennDOT letter dated October 20, 1998 be satisfied.

3. That the Planning Commission letter dated December 14, 1998 be satisfied.

4. That the driveway shall have a minimum entering radius of 10' and shall be paved to a 24' width for a distance of 50' back from the southern cartway edge of Route 926 and to be approved by PennDOT and the Township Engineer.

5. In order to save trees 12" caliper or larger, the Township Engineer shall provide an on-site approval of the final driveway layout.

Mrs. Dewey questioned Condition #4 and referred to a memo and drawing from YA dated 1/19/99 recommending that the driveway be 24' at the right-of-way and tapered to a width of 14' at Lot 1's driveway. The Board agreed that a 24' wide driveway was excessive and recommended the 10' entering radius and 14' wide driveway. Mr. Lang asked if the large oak tree is in the flag stem. Mr. Crawford confirmed that it was. Mr. Lang stated that steps must be taken to mitigate damage to the roots of this very large specimen oak tree. Mr. Miller told the Board that YA's letter states any tree larger than 12" must be marked on the plan. Mr. Crawford agreed that a TT representative should visit the site to identify large trees that would be impacted during construction of the driveway. The Board agreed with Mr. Crawford that there is no purpose in marking trees in the non-driveway area.

A motion was made, seconded (CL/RM) and unanimously carried to approve the Gleichert 3 lot subdivision final plan subject to the five conditions of the PC, including Condition 4 as amended and the addition of Condition 6 as follows: That steps must be taken to mitigate damage to the roots of the very large specimen oak tree.

Hill Property

Mrs. Dewey announced that the township purchased the Hill property on January 15, 1999. Mrs. Dewey proposed that the P&R suggest some names for the park and that a sign be erected on the property when a name is decided. One suggestion is Waln Run Park.

Thornbury Noble (TN)

Mrs. Dewey reported that the Township received a call, today, from TN's attorney informing TT that the applicant is coming in with a plan for the next PC meeting. Mrs. Dewey stated that the Supervisors must decide if this is a new application or an amended plan. Mr. MacDonnell responded that the Board took the position that the plan delivered to the Township in October 1998 on behalf of TN be considered a new application and not an amendment to an approved final plan. A motion was made, seconded (RM/CW) and unanimously carried that any plan submitted by Thornbury Noble to the Township shall be presented as a new application and will not be considered as an amendment to an approved final plan. The Board requested the Township Manager to notify counsel to TN regarding the Board's motion. Mr. Lang recommended that the Board have the Solicitor advise and support the Board's position on this issue.

Streambank Restoration Project

Mrs. Dewey noted that the Streambank Restoration Project at the Goose Creek Park begins March 15, 1999 and work days will be March 18th and March 19th.

Bill List

A motion was made, seconded (CL/RM) and unanimously carried to approve the bill list.

Other Business

Mr. MacDonnell commented that Donald Moore, owner of Calista and the Goose Creek Grill in TT, is going to be the recipient of the Paradigm Award presented by the South Eastern Economic Development Company of Pennsylvania (SEED Co). Mr. MacDonnell thought the Township should have representation at the luncheon on January 28, 1999. Mrs. Dewey and Mr. Wilson indicated that they would attend the presentation.

PC Reorganization Meeting – Mr. Miller informed the Board that the PC reorganized on January 13, 1999 and that he was reappointed Chairperson, Barbara Iacovelli was appointed Vice-Chairperson and Robert Eichman was appointed Secretary. The PC will continue to work on updating the ordinances and hold work sessions to realize this goal. Mr. Miller will meet with Andrew Rau, Esq. to put together conditions for Brandywine at Thornbury, Phase 9, Children's Learning Center final plan submitted January 13, 1999.

Adjournment

A motion was made, seconded (CL/RM) and unanimously carried to adjourn at 8:20 P.M.

Respectfully submitted,

Constance Dulin
Township Secretary

EXHIBIT 32

SUPER FRESH FOOD MARKETS, INC.
707 Railroad Avenue,
P.O. Box 68
Florence, New Jersey 08518

March 15, 1999

Thornbury Noble Limited Partnership
c/o Acciavatti Development, Inc.
1845 Middletown Road
Glen Mills, PA 19342

and

John Acciavatti
c/o Acciavatti Development, Inc.
1845 Middletown Road
Glen Mills, PA 19342

Re: Proposed Super Fresh
Route 202 and Route 926
Thornbury, PA

Thornbury Noble Limited Partnership ("Thornbury") is the owner of certain property located on the corner of Route 202 and Route 926, Thornbury, Pennsylvania (the "Shopping Center") upon which Thornbury intends to construct a supermarket building of approximately 52,000 square feet of floor area as shown on Conceptual Plan number P97858CA4 last revised March 1, 1999 (the "Premises"). Thornbury intends to lease the Premises to Super Fresh Food Markets, Inc. ("Super Fresh") and the parties have entered into a non-binding letter of intent regarding the terms of the proposed lease. The aforesaid letter of intent and the proposed lease are subject to Super Fresh's corporate approval.

Super Fresh and Thornbury have agreed that, notwithstanding that Super Fresh has not yet received corporate approval of the terms of the proposed lease of the Premises, Super Fresh shall immediately commence, or cause the commencement of, all land use engineering plans which may be required to obtain, and shall thereafter promptly apply for, all governmental approvals, including, without limitation, site plan approval, Planning Board approval and the approval of the Board of Supervisors of the Township of Thornbury, required for the construction of the Shopping Center and the use thereof for retail purposes, including use of the Premises as a supermarket and drugstore, excluding building permits, which shall not be Tenant's obligation (the "Land Use Approvals"). Super Fresh shall, after applying therefor, diligently seek to obtain each of the Land Use Approvals Thornbury hereby consents to the filing by Super Fresh of any and all applications required to obtain the Land Use Approvals and hereby agrees to diligently cooperate with Super Fresh in good faith to obtain the Land Use Approvals, including, without limitation, signing all applications which are required to be signed in the name of the owner of the Shopping Center in order to obtain the Land Use Approvals.

If a lease is not executed by Thornbury and Super Fresh within sixty (60) days of the date hereof for any reason, then Thornbury hereby agrees to reimburse Super Fresh, within thirty (30) days of Super Fresh's demand therefor, a sum equal to fifty (50%) percent of the reasonable costs incurred by Super Fresh to apply for and obtain the Land Use Approvals, including, without limitation, the cost of the preparation of all required engineering plans and the cost of all legal and other professional fees incurred by

Super Fresh in connection therewith. If the proposed lease of the Premises to Super Fresh does not proceed for any reason, but Landlord, or any party related to Landlord, hereafter develops the Shopping Center as a retail Shopping Center then Thornbury hereby agrees to reimburse Super Fresh for the remaining fifty (50%) percent of the aforesaid costs and expenses within thirty (30) days of Super Fresh's demand therefor. If Super Fresh does not receive corporate approval of the proposed lease at any time before or after the date hereof or if the proposed lease is not signed within sixty (60) days after the date hereof (unless Thornbury and Super Fresh are at that time still engaged in good faith negotiations in respect thereof) Super Fresh shall be entitled at any time thereafter to discontinue its applications for the Land Use Approvals, provided that the aforesaid agreement by Thornbury to reimburse Super Fresh shall continue to apply and upon Super Fresh's receipt of the aforesaid amounts Super Fresh shall assign and delivery [sic] to Thornbury the originals of all plans and applications in Super Fresh's possession in respect of the Land Use Approvals.

The parties hereto hereby acknowledge and agree that nothing herein shall be, or be deemed to be, an agreement by Super Fresh to the terms of the proposed lease which shall remain subject to the corporate approval of Super Fresh in its sole and absolute discretion.

John Acciavatti has signed this letter to confirm that he personally hereby unconditionally guarantees the obligations of Thornbury set forth herein. This guarantee is a guarantee of payment and not of collection and shall not he discharged by any negotiation or agreement between Thornbury and Super Fresh regarding the terms of the proposed lease or by any discharge of the obligations of

Thornbury hereunder other than a discharge by Thornbury's performance of the outstanding obligations.

Super Fresh Food Markets, Inc.

By: /s/ John Majczan

Agreed
Thornbury Noble Limited Partnership

_____

Agreed
John Acciavatti

_____

EXHIBIT 33

THORNBURY TOWNSHIP, CHESTER COUNTY
BOARD OF SUPERVISORS

MARCH 16, 1999

In attendance were Supervisors: Patricia M. Dewey (Chairperson), J. Christopher Lang (Vice-Chairperson), William A. Schmidt and Charles A. W. Wilson; Mahlon Rossiter (Township Manager), Andrew Rau (Solicitor), Ronald Miller and Robert Eichman (Planning Commission) and D. J. Tindall (Park & Recreation).

Minutes Approval

February 16, 1999 minutes – tabled due to a lack of quorum.
March 2, 1999 minutes – Mr. Lang requested that Page 2, *Circle of Trees,* be changed from White Cedars to Virginiana Cedars. A motion was made, seconded (WS/CW) and carried to approve the minutes incorporating Mr. Lang's change.

WEGO Police Report

Chief John Dumond reported that there were a total of 117 calls for the month of February. Twenty-four people are enrolled in the Citizens' Police Academy. Chief Dumond informed the Board that the bike patrol is working well. Mr. Rossiter stated that Thornbury Township's (TT) noise ordinance is being violated by a trash hauler that is picking up trash at 5:30 A.M. Chief Dumond responded that he would look into the complaint.

Thornbury Town Center

A motion was made, seconded (CW/CL) and carried authorizing the Township Manager to spend $5,000 for immediate building maintenance.

Commons at Thornbury a/k/a Thornbury Noble
Mrs. Dewey stated that TT has been advised that the applicant is requesting a Conditional Use Hearing. A motion was made, seconded (CW/WS) and carried authorizing the expenditure for consultant fees to study the impact of expanding the site. Mr. Rau noted it is the Township's position that there is a significant enough change proposed by the applicant to warrant this study.

Suburban Cable (SC) Franchise Renewal
Mr. Rau updated the Board on the status of the franchise renewal. Mr. Rau reported that most of the major sticking points with SC have been addressed. SC will agree to litigation if TT believes SC is failing in their performance which gives TT some enforcement powers that provide for financial penalties to the cable company. SC agreed in principle that if they provide Internet services in the future, TT will have the opportunity to demand extra fees. Mr. Rau showed SC's Trunk Line Map to the Board. Mr. Rau and the Board reviewed the map and clarified nine issues posed by SC. Mr. Rau told the Board he would review the inconsistencies in SC's letter dated 1/25/99 and return to SC with the Board's position. Mr. Rau told the Board he will prepare a finalized agreement with a summary for their review.

EXHIBIT 34

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
VOLUME II

– – –

THORNBURY NOBLE, LTD.	:	CIVIL ACTION
Plaintiff	:	
Vs.	:	
THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and The members of the Board of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MacDONNELL,	:	
Defendants	:	NO. 99-CV-6460

– – –

AUGUST 2, 2001

– – –

Oral deposition of JOHN ACCIAVATTI, in the above captioned matter, held at the offices of Siana, Bellwoar And McAndrew, 941 Pottstown Pike, Chester Springs, Pennsylvania, commencing at 10:00 a.m., on the above date, before Bonnie Block, Court Reporter and Notary Public.

* * *

[182] Q. Do you remember who?

A. Probably Joel Decker.

Q. Did it involve you?

A. Did it involve me?

Q. Yes. Or is this a conversation that you heard about from somebody else at Thornbury Noble?

A. I had personal conversations with Joel Decker. I don't remember how and when it was resolved or when the final word came.

Q. Who decided not to pursue a supermarket at the Thornbury Noble site? Was it Super Fresh or was it Thornbury Noble?

A. We decided to go with the strip center.

Q. Thornbury Noble did?

A. Yes.

Q. As regards to the plans that were submitted on or about October 6th, 1998, before the November 3rd meeting before the Board of Supervisors that were

* * *

EXHIBIT 35

THORNBURY NOBLE LTD.

April 7, 1999

Thornbury Township Chester County
P.O. Box 134
Westtown, PA 19395

RE: Permits – The Commons at Thornbury

Dear Sirs:

We are hereby submitting our Application for the Building Permit for our approved plan. Therefore, enclosed are the following documents.

1. Application form for building permit
2. Mandatory worker's compensation form
3. Certificate of Insurance
4. Copy of letter from PA. Department of Licenses and Inspections extending their approval
5. 3 copies of architectural plans signed and sealed with specifications.
6. 3 copies of site plans which include soil and erosion control.
7. Approval letter from Chester County on erosion and sediment control
8. Public water and PA Licensed sewer already operable – Not applicable

Not included in this submission is the application for Certificate of Occupancy – Not applicable.

If any additional information is required please call me or my attorney Mary Ann Rossi immediately.

Sincerely,

/s/ Allan Baumholtz
Allan Baumholtz

CC: Mary Ann Rossi, Esq. **HAND DELIVERED**

P.S. Office building plans already on file

---

(610) 399-1425 THORNBURY TOWNSHIP No. _____
CHESTER COUNTY Fee _____

APPLICATION FOR
BUILDING PERMIT

OFFICE USE: Type ___ Use ___ Zone ___ Tax Parcel # ___

Subdivision _____ Lot # _____ Address _____

Owner Thornbur Noble Limited Phone # 215-732-5250

Address P.O. Box 179 Westtown PA

Contractor Falcone and Sons Phone # 610 891 9111

Address 650 Painter Rd. Media

Architect/Other Murphy Architectural Phone # 610 696 4843

Address 1450 Brook Rd _____
West Chester PA

THE APPLICANT (CIRCLE 1: owner-contractor-architect)
HEREBY MAKES APPLICATION TO: [ ] alter [ ] erect

Description STRIP RETAIL STORES/OFFICES BILD.

On property located at _____

Lot # _____ Lot Area _____ Frontage _____ Depth _____

Set back from R.W. ___ Side Yard L ___ R ___ Rear Yard ___

Floor Area _____ Height _____ Width _____ Depth _____

Ground Coverage - bldg.__ S.F. Pavement__ S.F. Total__ S.F._

Sewage Disposal – Public Sewer [ ] On Site [ ]
CCHD Permit # _____ Date _____

Water Supply – Public Water [ ] On Site [ ]
CCHD Well Permit # _____ Date _____

Building Plans – Attached [ ]
Building Data on back of application [ ]

See Attached Drawings

I hereby acknowledge that I have read this application and state that the above is correct and agree to comply with all the provisions of the Thornbury Township Building code and Zoning Ordinance.

PERMIT
APPROVAL

Signature of Property Owner
/s/ Allan Baumholtz Partner Date 5/6/99

Building, Inspector _____ Date _____

Zoning Officer _____ Date _____

In the event that an application for a permit should, in the opinion of the Township, require review by the Township Engineer or other professional personnel retained by the Township, the applicant shall bear such costs as are incurred by the Township in connection with such review. If additional field inspections are necessary to control soil erosion problems, the applicant will be responsible for the cost of such inspections.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD., Plaintiff v. THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the Members of the Board Of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON and ROBERT A. MacDONNELL, Defendants	CIVIL ACTION NO. 99 CV-6460 JURY TRIAL DEMANDED

ORDER

AND NOW, this ___ day of ___, 2003, upon consideration of Defendants' Renewed Motion for Summary Judgment and the response of plaintiff Thornbury Noble, Ltd., thereto, it is hereby ORDERED and DECREED that Defendants' Renewed Motion for Summary Judgment is DENIED.

BY THE COURT:

_____
THOMAS N. O'NEILL, JR., J.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD., Plaintiff v. THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the Members of the Board Of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON and ROBERT A. MacDONNELL, Defendants	CIVIL ACTION NO. 99 CV-6460 JURY TRIAL DEMANDED

RESPONSE OF PLAINTIFF, THORNBURY NOBLE, LTD., TO THE RENEWED MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS, THORNBURY TOWNSHIP AND THE THORNBURY TOWNSHIP BOARD OF SUPERVISORS

(Filed May 22, 2003)

Plaintiff, Thornbury Noble, Ltd. ("Thornbury Noble"), by and through its attorneys, MacElree Harvey, Ltd. and Fox Rothschild LLP, hereby responds to the Renewed Motion of Defendants, Thornbury Township and the Thornbury Township Board of Supervisors for Summary Judgment pursuant to Rule 56 of the Federal Rules of

Civil Procedure and requests that said renewed motion be denied based upon the attached brief in opposition to Defendants' Renewed Motion for Summary Judgment.

WHEREFORE, Plaintiff, Thornbury Noble, Ltd., respectfully requests that this Honorable Court deny Defendants' Renewed Motion for Summary Judgment.

Respectfully submitted,

/s/ Mary Ann Rossi

Mary Ann Rossi, Esquire
I.D. No. 30013
MacElree Harvey, Ltd.
17 West Miner Street
Box 660
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Craig A. Styer, Esquire
I.D. No. 60253
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Counsel for Thornbury Noble, Ltd.

Date: May 22, 2003

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.,	:	CIVIL ACTION
Plaintiff	:	NO. 99 CV-6460
v.	:	
THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the Members of the Board Of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON and ROBERT A. MacDONNELL,	:	
Defendants	:	JURY TRIAL DEMANDED

ORDER

AND NOW, this ___ day of ___, 2003, upon consideration of Defendants' Renewed Motion for Summary Judgment and the response of plaintiff Thornbury Noble, Ltd., thereto, it is hereby ORDERED and DECREED that Defendants' Renewed Motion for Summary Judgment is DENIED.

BY THE COURT:

_____
THOMAS N. O'NEILL, JR., J.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.,	:	CIVIL ACTION
Plaintiff	:	NO. 99 CV-6460
v.	:	
THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the Members of the Board Of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON and ROBERT A. MacDONNELL,	:	
Defendants	:	JURY TRIAL DEMANDED

RESPONSE OF PLAINTIFF, THORNBURY NOBLE, LTD., TO THE RENEWED MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS, PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON and ROBERT A. MACDONNELL

(Filed Apr. 17, 2003)

Plaintiff, Thornbury Noble, Ltd. ("Thornbury Noble"), by and through its attorneys, MacElree Harvey, Ltd. and Fox Rothschild LLP, hereby responds to the Renewed Motion of Defendants, Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Jr., Charles A.W. Wilson, and Robert A. MacDonnell for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and requests that said renewed motion be denied based upon

the attached brief in opposition to Defendants' Renewed Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

WHEREFORE, Plaintiff, Thornbury Noble, Ltd., respectfully requests that this Honorable Court deny Defendants' Renewed Motion for Summary Judgment.

Respectfully submitted,

/s/ Mary Ann Rossi
Mary Ann Rossi, Esquire,
I.D. No. 30013
MacElree Harvey, Ltd.
17 West Miner Street
Box 660
West Chester, PA 19381-0660
(610) 436-0100

Craig A. Styer, Esquire,
I.D. No. 60253
Fox Rothschild LLP
760 Constitution Drive
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Exton, PA 19341-0673
(610) 458-7500
Counsel for Thornbury Noble, Ltd.

Date: April 17, 2003

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.,	: CIVIL ACTION
Plaintiff	:
v.	: NO. 99-CV-6460
THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the members of the Board of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MacDONNELL,	:
Defendants	: JURY TRIAL DEMANDED

PLAINTIFF'S EXHIBITS TO BRIEF IN OPPOSITION TO THE MOTIONS OF DEFENDANTS FOR SUMMARY JUDGMENT PURSUANT TO RULE 56

EXHIBIT 2

Charles A.W. Wilson
855 Meadowcroft Circle
West Chester, PA 19382
610-399-1089
Fax 610-399-8281
e-mail ChuckW8286@aol.com

November 20, 1997

Memo to:

Thornbury Township Supervisors
Chester County, Pennsylvania

Yesterday Mahlon and I met with John and Richard Acciavotti regarding Thornbury Commons. They have received letters of interest from Super Fresh and Genuardis, both with an interest in placing a 50,000 square foot supermarket on their property. For whatever reason they are selecting Genuardis, who would like to open a new market by Thanksgiving of next year.

Our discussion indicated the remaining open foundations would be filled and the market building would be placed on the eastern end of the property. This seems viable, except that it places the building in an overlapping position with the entrance to the property from route 926.

The Acciavottis already own, as we know, the residential property immediately east of Thornbury Commons. They have now entered into a purchase agreement for the next adjacent residential property along route 926. As a result if we allow them to locate the eastern edge of the market building on the eastern border of the first residential property, the route 926 entrance is opened significantly. This would require a zoning change at the first residential property and some manner to accommodate the building

location on the edge of the "commercial" property. The second residential property which they are under contract to purchase will become a part of the condominium agreement of Thornbury Commons, but would be a residential rental property.

Their proposal seems realistic and achievable. While the timetable will require some cooperation, the engineering changes seems [sic] accomplishable, with the understandable [sic] that storm water management basin must be re-evaluated and may need to be resized to accommodate the increased impervious area if we allow them to move the building onto what is now a residential parcel (ie, the adjacent residential parcel).

As they are and we have been anxious to have some progress on this property, could you all please respond in some manner as to whether you are willing to entertain a proposal for the market and rezoning of the adjacent residential parcel to allow for better building placement and easier ingress and egress from Thornbury Commons.

The Acciavottis will present a sketch plan at our December 2nd meeting.

Best regards,

Chuck Wilson

EXHIBIT 4

THORNBURY TOWNSHIP, CHESTER COUNTY BOARD OF SUPERVISORS

JANUARY 20, 1998

In attendance were Supervisors: Charles A. W. Wilson (Chairman), J. Christopher Lang (Vice Chairman), Patricia M. Dewey, Robert A. MacDonnell and William Schmidt; John Hall (Solicitor), Ronald Miller and Robert Eichman (Planning Commission), D.J. Tindall and Helene MacLaughlin (Park & Recreation Commission) and Mahlon Rossiter (Township Manager).

Mr. Wilson called the meeting to order at 7:30 P.M. and led the Pledge of Allegiance.

Mr. Wilson stated that the Commons at Thornbury is not on tonight's Agenda. The developer has not submitted a sketch plan for presentation. Mr. Wilson announced that the Supervisors are going to have work sessions prior to the public meetings. Nothing will be voted on and the sessions are open to the public. To avoid interruptions during the meetings the Board will only have public comments at the end of the meeting.

Police Report

Sergeant Barton reported there were 87 calls for the month of December. The township's yearly percentage of calls for 1997 was 6.6%. Sgt. Barton acknowledged a resident's complaint regarding U-Turns at Route 202 and Greentree Drive and stated that WEGO would look into the complaint.

Minutes

A motion was made and seconded (RM/CW) to approve the minutes of the Reorganization Meeting and Regular Meeting held January 5, 1998. Mrs. Dewey and Mr. Lang in favor. Mr. Schmidt was absent form the January 5, 1998 meeting.

Brandywine at Thornbury (BT)

Mary Ann Rossi (Attorney) was present on behalf of K. Hovnanian to request a modification of Condition 59 of the PRD plan. Mrs. Rossi stated that the condition obligates the applicant to provide 12,000 s.f. of commercial area. The applicant must construct at least 3,000 s.f. of commercial space prior to the issuance of the building permit for the 160th unit of the PRD. The Bozzuto Group is requesting 212 permits for the apartment complex. It was not anticipated that Bozzuto would pull all permits at the same time. The applicant has not been successful in attracting anyone to build a convenience food store. Discussion is underway with a potential user for the entire 12,000 s.f., but it is unlikely that a convenience store will be at this location. A motion was made, seconded (PD/WS) and unanimously carried to amend Condition 59 extending construction time of the commercial site in Phase 9 indefinitely, up and until the "build out" of the project. In the event that there is not a total build out of the commercial area when BT is completed, whatever remains of the 12,000 s.f., shall be reserved for open space. Mr. Lang asked Mrs. Rossi how is Phase 9 being marketed and requested a Listing Sheet. Mrs. Rossi replied that she would obtain this information from the applicant and forward it to Mr. Rossiter.

Exxon Final Land Development Plan

No one was present on behalf of the applicant. Mr. Wilson reported that the Exxon Station located at Routes 202 and 926 submitted a plan to convent [sic] the three bays into a Tiger Mart convenience store. Mr. Wilson read Mr. Miller's letter dated 1/16/98 stating the PC recommended approval of the plan with six conditions. Mr. Miller informed the Supervisors there was a concern regarding the traffic flow within the site, as well as traffic entering and exiting at Route 202 and 926. The PC suggested that the exit/entrance at Route 926 be moved further west, however, Exxon has PennDOT approved for the entrance location. A motion was made, seconded (PD/CW) and unanimously carried to approve Exxon's Land Development plan contingent upon the Conditions of Approval.

Neall Final Subdivision Plan

Percy Neall was present on behalf of his three lot subdivision located at S. Concord Road and Old Bailey Lane. Mr. Wilson read Mr. Miller's letter dated 1/16/98 approving the plan with one condition. The PC recommended that Lot 2 be reconfigured and requested that Mr. Neall go before the Zoning Hearing Board (ZHB) for a variance. Mr. Lang commented the lot layout is irrational, it may comply but it fails in terms of harmony. Mr. Lang felt approving the plan is setting a poor precedent and recommended that Mr. Neall go before the ZHB. Mr. Neall responded that he cannot go before the ZHB because he cannot claim a hardship and therefore has no case. Mr. Hall responded that the Board can take a position with the ZHB of not being in opposition. Mrs. Dewey asked Mr. Hall if the Board can grant a waiver. Mr. Hall replied that a waiver

cannot be granted for a zoning issue, only an ordinance issue. Mr. Wilson recommended tabling action on the plan until the February 3, 1998 meeting. Mr. Neall informed the Board that he would go before the ZHB, with the PC and Supervisors endorsement after the plan is approved and recorded and the fees paid by the township for the hearing. Mr. Miller stated that the PC suggested that Mr. Neall pursue variances to improve the lot configuration, and never implied that the township pick up the cost. The clock on the Neall subdivision expires 2/11/98.

Echo Hill II Final Subdivision Plan

Bruce Hill (Applicant) and P.J. Close (Kelly Engineers) were present on behalf of six lot subdivision located at Westtown-Thornton Road and Echo Hill Road. Mr. Wilson read Mr. Miller's letter dated 1/16/98 recommending approval of the final plan with conditions. Mr. Close informed the Board that all conditions have been addressed: Condition 2 regarding the Deed Restriction for the trail easement on Lot 1, and storm water management facilities on Lots 1 & 2 have been noted on the plan as part of "Note 16" on the title plan. Condition 7 stating "Notification and coordination with the Township is required prior to starting work in the vicinity of Echo Hill Road" has been added to the Title Plan. Mr. Lang questioned the trail width and stated a need to establish some clarity on the trail improvements. Mr. MacDonnell stated the Solicitor could approve language for the trail system so that the Township would have maximum flexibility. A motion was made (CL/WS) and unanimously carried to approve the plan with the Conditions and contingent upon the applicant recording a deed restriction pertaining to storm water management for Lots 1 and 2 and a deed restriction

pertaining to the trail easement following final review and approval by the Township Solicitor and Board of Supervisors.

ValleyDel Publications Lease Agreement

Mr. Adams reviewed and approved the lease for signature. A motion was made, seconded (PD/CL) and unanimously carried authorizing Mr. Wilson to execute the lease.

Resolution 1998-3

Mr. Rossiter stated the Municipal Records Manual requires the Township to declare its intent to follow the schedules and procedures for disposition of records. This is the first time the Township has taken this action, but the declaration of intent is a one time only requirement. A motion was made, seconded (CL/WS) and unanimously carried to approve Resolution 1998-3.

Resolution 1998-4

Mr. Rossiter informed the Board that in accordance with the Municipal Records Manual this resolution must list the materials that will be destroyed. A motion was made, seconded (CL/WS) and unanimously carried to approve Resolution 1998-4.

Bill List Approval

Mr. Lang questioned Sattherthwaithe's bill and asked Mr. Rossiter to determine if there is a waiver for agricultural use and that a percentage of their payment until they

detail the regulation. A motion was made, seconded (WS/PD) and unanimously carried to the [sic] approve the bill list.

Thornbury Park Commercial Center – Goose Creek Grill

Mr. Wilson asked for Board approval to allow Mr. Rossiter to proceed with the bids to replace the roof in accordance with the design review by Mr. Lang and Mr. Stevenson. The low bid total for the roof replacement is $6500.00. The lessee will contribute $3000.00 for the gable modification and the Township (lessor) will fund the remainder. A motion was made, seconded (CL/WS) and unanimously carried to authorize the Township Manager to go forward with the roof replacement. The final roof drawings from the lessee are subject to the review of Mr. Lang, Mr. Stevenson and Mrs. Tindall.

Office Computers – The township received an estimate in the amount of $7194.00 for two new computers, upgrading two computers, modem, printer, networking and labor. Mr. Lang asked Mr. Rossiter to obtain two competitive proposals. A motion was made, seconded (CL/RM) and unanimously carried to approve the purchase of computer equipment up to $7200.00 and secure two additional proposals for the same equipment already quoted.

PSATS Convention – A motion was made, seconded (CL/RM) and unanimously carried nominating Patricia Dewey as the voting delegate for the township at the Pennsylvania State Association of Township Supervisors Convention.

Hazardous Waste – Mrs. Dewey informed the Board that she will be attending a Hazardous Waste Collection Program meeting on 1/27/98. They are looking for sites in Bucks, Chester, Delaware Counties for establishment of a waste collection site.

Brandywine at Thornbury – Wastewater Treatment Plant

Mr. Lang referred to a letter dated 1/20/98 from David Linahan of YA. The preliminary cost estimate for the installation of the proposed "drip" system is $246,280 and does not include engineering or permitting. The Township would need to cover a short fall of approximately $100,000. Mr. Lang requested that Mr. Linahan attend the 2/03/98 meeting to explain his correspondence.

Public Comment

Residents from Thornbury Estates were present to protest Richard Acciavatti's request to rezone a residential parcel adjacent to the Commons at Thornbury commercial site.

Ronald Giacinto of 1240 Surrey Road read a three page letter objecting to any rezoning and cited the reasons why this change would have a negative impact on the community. Mr. Giancinto [sic] requested that his letter be made part of the minutes. Please note that Ronald Giacinto's letter dated January 20, 1998 is shown as Exhibit A to the minutes. Mr. Giacinto emphasized that the open pits must be filled in or capped and expressed concern that the metal cage surrounding the pumping station was topped with razor wire.

Stephen Levasseur of 129 E. Street Road, Yvonne Webster of 1249 Surrey Road, a resident at 1244 Surrey Road, and Robert Eichman of 1245 Wilmington Pike opposed any rezoning and asked the Board to take action regarding Mr. Acciavatti's failure to make the property safe. Virginia Hohenberger of 1242 Surrey Road informed the Board that the required fencing and barriers were never installed by Mr. Acciavatti and that the erosion problem is ongoing. Mud from CT is running into her backyard and has ruined her septic system. Mrs. Dewey asked Mrs. Hohenberger for permission to walk the property. Mrs. Hohenberger agreed and thanked Mrs. Dewey. Mr. MacDonnell stated this Board has been attempting to have Mr. Acciavatti fill in the open foundations even to the point of sending in our own trucks to do the work. Mr. Acciavatti should be advised that the Township will not consider any rezoning until the foundations are filled in and proper soil erosion control has been completed. Mr. Lang recommended clarifying what action must be taken, give a deadline and if not met cite Mr. Acciavatti. A motion was made, seconded (RM/CW) and unanimously carried that Mr. Acciavatti be notified that the Board of Supervisors will not consider any modification of the land use plan which involves rezoning of any piece of his property at Route 202 and 926 until the two foundations are filled in and effective soil erosion fencing is installed on the southern end of the property that must be approved by the Township Engineer.

Adjournment – A motion was made, seconded (CW/RM) and carried to adjourn at 9:50 P.M.

Respectfully submitted,

Constance Dulin
Township Secretary

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

– – –

THORNBURY NOBLE, LTD.	: CIVIL ACTION
Plaintiff	:
Vs.	:
THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and The members of the Board of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MacDONNELL,	:
Defendants	: NO. 99-CV-6460

– – –

AUGUST 2, 2001

– – –

Oral deposition of ALLAN BAUMHOLTZ, in the above captioned matter, held at the offices of Siana, Bellwoar and McAndrew, 941 Pottstown Pike, Chester Springs, Pennsylvania, commencing at 1:30 p.m., on the above date, before Bonnie Block, Court Reporter and Notary Public.

* * *

A. Yes, whatever the date was. We got started with our building right before the deadline, so whatever that was.

Q. Okay.

A. Yes.

Q. Did the five-year time limitation on your ability to build out the L-shaped strip mall, did that factor into the decision to build the L-shaped strip mall as opposed to pursuing the box supermarket?

A. As a result of all the delays that we faced, yes, that was actually one of them.

Q. You said as a result of all the delays. I'm asking about did there come a point in time where you said we are not going to pursue the supermarket, we are going to build out the L-shaped strip mall?

A. After the second attempt to put a supermarket in place, and that [35] would be with Super Fresh at this point, and where Super Fresh stated specifically that they will build within the existing Commercial B Zoning. And the response that we got from Super Fresh, when they went to the township to talk to them about things that they required, they got turned off. I mean, it's not that we walked away from anything. We didn't walk away from anything. We got shot down with Genuardi's. And I'm sure we'll get into that later. When Super Fresh came forward and they said, hey, we will build within however we can build it, we will build it. And then they came in with the impression from the township that it wasn't going to happen. And it was based on that that we decided the time

frame was such we couldn't afford to go for this so-called conditional use they were asking.

My position, through my attorney, was we had a vested right to do [36] what we were doing. The township was taking the position that, no, we had to go for a conditional use. I'm hanging out in left field. They're delaying us. I can't tell you how many times they had promised to hear a presentation from me that, for some strange reason, didn't make the docket. We'll hear you next month; we'll hear you next month. Months flew away.

Q. Who was your attorney?

A. Mary Ann Rossi.

Q. Okay. You said that Super Fresh came back to you, Thornbury Noble –

A. To John.

Q. – to John, okay, and said that the township says we have to go for a conditional use?

A. Oh, I'm sorry. I thought you were talking when they first came back in the end of '97. When they were leaving, yes.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VOLUME II

- - -

THORNBURY NOBLE, LTD.	:	CIVIL ACTION
Plaintiff	:	
Vs.	:	
THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and The members of the Board of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A. W. WILSON, and ROBERT A. MacDONNELL,	:	
Defendants	:	NO. 99-CV-6460

- - -

AUGUST 10, 2001

- - -

Oral deposition of ALLAN BAUMHOLTZ, in the above captioned matter, held at the offices of Siana, Bellwoar and McAndrew, 941 Pottstown Pike, Chester Springs, Pennsylvania, commencing at 9:00 a.m., on the above date, before Bonnie Block, Court Reporter and Notary Public.

* * *

[217] BAUMHOLTZ-GONZALES

Q. Did you do any other work for him prior to becoming a limited partner in Thornbury Noble?

A. Real estate appraisals. I appraised a few of his properties.

Q. Are you a partner or limited partner with any other entities in which Mr. Acciavatti is a partner?

A. No.

Q. Are you involved in any other entities in which Mr. Acciavatti – when I say involved, either stock or in any of Mr. Acciavatti's businesses.

A. No, this is my only experience.

Q. When you were asked early on in your deposition, the first day of your deposition, about what happened between January of 1997 – actually, December of 1997 and July of 1998, you had talked about meetings you had with residents and some other concerns that you were trying to address before you, and this is my [218] term, got your ducks in order to make a presentation to the township?

A. Yes, sir.

Q. About how many meetings did you have with residents during that time period?

A. Never had the ability to meet everybody. My initial meeting was with Ron Giacinto. He eventually became the spokesman for the immediate neighbors. I should know their names. I met three of the five immediate residents, Eichman being one of them.

Q. Did you ever meet with Mr. McGovern, Kevin McGovern?

A. No.

Q. You said you met with Mr. Eichman?

A. Eichman.

Q. Did you ever meet with May Hornberger (phonetic)?

A. Yes. We discussed landscaping. And I met with Mrs. [219] McCleary and one other. Did you say Hornberger? I met Max and the wife. The wife is a landscape expert.

Q. The meetings that you had, and I assume you had more than one meeting with the residents, or was it just one meeting where everybody came?

A. No. No, I went to meet them. I, personally, went to meet them, to introduce myself and assure them that –

Q. I understand that. I just want to know –

A. I never met everyone together.

Q. Let me ask the question. I just want to get in and get out. Did you have more than one meeting with the residents?

A. I believe I did.

Q. Did you ever meet with all of the residents as a group at one time?

A. No. The only time I saw all [220] of them together was at the July meeting.

Q. Okay. You said you initially met John Giacinto and he eventually became the leader of that group of citizens; is that correct?

A. That's correct.

Q. When did you first meet with Mr. Giacinto?

A. That was June 4th, 1998.

Q. Before that time, did you ever talk with him?

A. I called a few times to set up an appointment.

Q. Had you had any substantive discussions with Mr. Giacinto before you actually met him?

A. No.

Q. When you met him, where did you meet him?

A. On the Thornbury Commons grounds.

Q. Was anybody else present for that meeting?

* * *

EXHIBIT 6

THORNBURY TOWNSHIP, CHESTER COUNTY
BOARD OF SUPERVISORS MEETING
APRIL 1, 1997

In attendance were Supervisors J. Christopher Lang (Acting Chairman), Paula Gowen, Robert MacDonnell and William Schmidt; Robert Adams (Solicitor); Ronald Miller and Robert Eichman (Planning Commission); Mahlon Rossiter (Township Manager) and approximately 12 guests.

Mr. Lang led the Pledge of Allegiance and called the meeting to order at 7:37 P.M.

Minutes Approval
A motion was made, seconded (PG/WS) and carried to approve the minutes of March 24, 1997 subject to changes on Page 2 and 4 as requested by Mr. Lang.

Bridlewood Farm – Phase 3B
Mary Ann Rossi and Zack Coburn were present on behalf of K. Hovnanian & Companies

Mr. Lang stated that the applicant granted the township an extension to April 8, 1997 for Phase 3B. After some discussion, Mrs. Rossi authorized an additional extension to April 15, 1997 for for action by the Board of Supervisors on Phase 3B. Mrs. Rossi stated that an alternate plan for 3B was delivered to the township on March 31, 1997, and a letter was sent today regarding the plan that was just submitted.

Ordinance 1997-4 and Ordinance 1997-5
Mr. Adams stated that the advertised ordinances authorize the issuance of general obligation notes in the amount

of $550,000 and $375,000. The ordinances must be executed in order to obtain the loan agreement proposed with the bank for the purpose of financing the park and the Thornbury Park Center. Mr. Adams reported that there is a debt service schedule attached to the ordinance which shows a fixed rate of 5.18% for the first seven years, and a variable rate of 70% of prime for the last 8 years. The bank prepared the schedule showing a capped variable rate of 12% because the Pennsylvania Community & Economic Development (DCED) requires presentation of the maximum interest rate. Mr. Adams stated that the adoption of the ordinances by the Supervisors must be advertised, and anticipates closing the loan by April 20, 1997. A motion was made, seconded (RM/WS) and carried to execute Ordinance 1997-4 ($550,000 Note) and Ordinance 1997-5 ($375,000 Note).

Thorncroft Woods

Mr. Ronald Hewes and Mr. Thomas Hewes were present to represent Thorncroft Woods.

Installation and Maintenance Agreement for Wastewater Disposal Systems – Mr. Rossiter stated that the building inspector, Paul Wolf inspected the reserve fields that had been staked out and on the strength of the building inspector's recommendation the agreement was released. Mr. Rossiter reported that Mr. Linahan was still concerned over the future use of the reserve fields and compaction of the ground in the reserve area. Mr. Hewes presented a letter dated 4/1/97 addressing Mr. Linahan's concerns. Mr. Hewes proposed to implement the following procedures: (1) Prior to issuance of each certificate of occupancy, the developer will supply the township with a copy of the Sewage Agreement prepared by Department of Environmental Protection (DEP), which has been executed by the

EXHIBIT 6

THORNBURY TOWNSHIP, CHESTER COUNTY
BOARD OF SUPERVISORS MEETING
APRIL 1, 1997

In attendance were Supervisors J. Christopher Lang (Acting Chairman), Paula Gowen, Robert MacDonnell and William Schmidt; Robert Adams (Solicitor); Ronald Miller and Robert Eichman (Planning Commission); Mahlon Rossiter (Township Manager) and approximately 12 guests.

Mr. Lang led the Pledge of Allegiance and called the meeting to order at 7:37 P.M.

Minutes Approval
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Bridlewood Farm – Phase 3B
Mary Ann Rossi and Zack Coburn were present on behalf of K. Hovnanian & Companies

Mr. Lang stated that the applicant granted the township an extension to April 8, 1997 for Phase 3B. After some discussion, Mrs. Rossi authorized an additional extension to April 15, 1997 for for action by the Board of Supervisors on Phase 3B. Mrs. Rossi stated that an alternate plan for 3B was delivered to the township on March 31, 1997, and a letter was sent today regarding the plan that was just submitted.

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homeowner. (2) The developer will supply to the township an executed site plan signed by the future homeowner, detailing the location of the installed sewage disposal system and the replacement area, if required by Chester County Health Department (CCHD). (3) If any additional requirements/restrictions are required on a lot it will be noted on the site plan and no structure above or below ground will be permitted in the replacement field area. Mr. Hewes commented that two of the eight lots have sand mounds and that the reserve area for the sand mounds would not be disturbed.

Mr. Adams stated that there was no problem with the agreement, but DEP and CCHD have put the reporting responsibility on the homeowner and a monitoring requirement on the township with no authority. It is not up to the township to approve or disapprove this system, DEP issued the permit, not the township. Mr. Adams stated that some type of administrative process must be set up to insure that the inspections have been performed Mr. Schmidt questioned how a buyer of a resale property in Thorncroft Woods would be made aware of the maintenance agreement. Mr. Rossiter stated that the previous homeowner's plans would be on file in the township office. Mr. Adams recommended that if Mr. Hewes dedicates the road to the township a note should be put on the revised recorded plan that would give notice to the lot owner of these recommendations and the existence of these agreements. The plan is a permanent record and gives present and future residents "notice".

Mr. Lang stated that he wanted a note on the plan whether or not the township takes dedication of the road. Mr. Hewes reported that when this sewage agreement gets recorded it will be part of the title report Mr. Adams

agreed that the title report would show the conditions and that future homeowners could not claim, "no notice".

Escrow Release – Thorncroft Wood – Mr. Rossiter stated that Yerkes Associates made an inspection and had signed off for release of the escrow. A motion was made, seconded (RM/PG) and carried to release $43,034.00 of the $187,031.00 escrow amount, leaving a balance of $143,997.00.

Brinton Ridge Complex – Phase 8

Mrs. Rossi was present representing the Bozzuto Group on behalf of the Brinton Ridge Apartments.

Mr. Adams stated that he has reviewed the revised Condition of Final Approval and it appears to be comprehensive and incorporates all the changes recommended March 24, 1997. Mrs. Rossi reviewed the five changes to the Conditions as follows:

Condition 8 The applicant agreed to revise the plans to (a) Show the inset on the 1st floor of the club house building to be at least 4 feet. (b) The anchoring detail for the country casual bench shall be added to the plans. (c) The correct detail for exterior steps shall be provided. (d) The retaining wall detail shall be added to the plans. (e) Signage for the community shall be consistent with the specifications shown for Bozzuto's "Harborplace" condominiums located in Virginia.

Condition 9 Plans shall contain a note requiring that triple-glazed windows shall be installed on the east side of Buildings 4, 5, 4 7 and 8. In addition, the applicant shall conduct a noise study on the north and south sides of these buildings and install triple-glazed windows

wherever the noise study shows that the level of sound will exceed an outside level of 65 decibels and exceed 45 decibels inside.

Mr. Lang asked Mrs. Rossi if anyone advised the applicant that 65/45 is the correct decibel level. Mrs. Rossi stated that applicant did not run it past a consultant but agreed that the maximum acceptable decibel level would be subject to review and approval by a designated township consultant.

Condition 19 Mrs. Rossi agreed that no shrubs or trees shall be located within the utility easements, including all storm water, sanitary sewer and public water system right-of-way/easement areas, except for two trees at the entrance to the community.

Condition 22 Mrs. Rossi agreed that the applicant shall provide a note on the plan indicating that no trees, shrubs, structures, fencing or other potential obstructions shall be placed between the pool fence and building 5 and 6 that would reduce the unobstructed distance between the fence and those building less than 12', except as may be approve by the township's Fire Marshal.

Condition 27 Mrs. Rossi agreed that the applicant will submit a basin planting plan designed to introduce vegetation within the basin to promote a natural appearance provided that the function of the basin will not be impaired by any vegetation and that the Chester County Conservation District approves the plan.

A motion was made, seconded (WS/PG) and carried to approve Phase 8 based on the five changes to the Conditions

of Final Approval and any additional language deemed appropriate by the township's solicitor.

Final Sewage Agreement – Phase II

Mr. Adams reported that several changes were made to the agreement because some items were not applicable and that David Linahan agreed to the modifications. Mr. Adams noted that Mr. Linahan will determine the bond amount and upon receipt of the financial security from the applicant, the township can execute the Final Sewage Agreement for Phase II.

Faucett Tract

Randall Schauer (attorney), Kevin Lahn and Robert Waters (R. J. Waters & Associates, Inc.) and Robert Plucinek (Chester Valley Engineers) were present to present an informal sketch plan for the Faucett tract located at the northeast corner of Route 202 and Dilworthtown Road.

Mr. Lahn stated the 25 acre property has 6.3 acres zoned Commercial which is situated in Birmingham Township, and the balance of the property lies in Thornbury Township which is zoned Agriculture/Residential. Waters & Associates propose to develop a neighborhood shopping center anchored by a supermarket and would include several small convenience and service oriented tenants as well as a freestanding bank, two freestanding restaurants and a drug store. The center would be similar to the Shoppes at Longwood which was developed and owned by Waters & Associates. Mr. Lahn informed the Supervisors that they have had preliminary discussions with Mr. Iacobucci of the Greens at Penn Oaks regarding a sewer and water tie-in. Mr. Lahn said they are not proposing a high density center for the Faucett tract. The proposed center will cover the same size land area as the Shoppes at

Longwood. Mr. Lang asked Mr. Lahn if they considered developing the existing commercial center at Routes 202 and 926. Mr. Lahn responded that the site is not large enough to accommodate a super market. Mr. Lang told the applicants that they must convince the township that there is significant reason to rezone the Faucett tract. Mr. Lang asked what will happen to the historic properties on the proposed site. There is an 18th century house in the back as well as the 19th Century Faucett home. Mr. Lang recommended the applicant incorporate the historic structures into the proposal. Mr. Lang commented that he would be against Route 202 looking like a commercial strip. Mr. Schmidt stated that the township has a commercial site three-quarters of a mile away on Route 202 that is only partially developed, therefore, the Supervisors would need justification to rezone this tract from Agriculture/ Residential to Commercial.

Mr. Miller commented that whether the tract is zoned residential or commercial, the Official Township Map (OTM) has some items that are specific to this property. There was discussion on the proposed road that is shown on the OTM, and suggestions on how to connect a road from the Greens at Penn Oaks, through the Stoltfus property, through the proposed commercial center and onto Dilworthtown Road. Mr. Lahn stated that they will meet with Birmingham Township and after the meeting will put together a revised package to present to the township. Mr. Lang recommended that the applicants try to maintain some character on the site.

Park & Recreation Commission

Mrs. Tindall reported on the successful Easter Egg Hunt held at the Concept School on March 22, 1997. Mrs. Tindall stated that Mr. Rossiter, Mrs. Dewey, Mr. Comitta

and herself met on March 31st work on the park proposal bid package and hope to have it ready for presentation by the April 15th Board of Supervisors meeting for action.

Dallett – Agreement of Sale
Mr. Rossiter asked the Board to review the draft Agreement of Sale for the purchase of 26 acres of open space along Cheyney Road prepared by Richard A. Fineman, attorney, for the Dallett family. This is step one of acquisition plan to consummate the purchase by early fall. Mr. Lang suggested the Board read the agreement and give input to Mr. Rossiter by next week.

Mr. Schmidt questioned if there was the potential of environmental problems on the Dallet tract and suggested that the township should look into doing a Phase I. Mr. Rossiter stated that the township must go through the whole subdivision process.

Westbourne Road – Mr. Lang reported that the township owns property along Westbourne Road and that there is a dangerous shoulder along this road. Mr. Lang suggested evaluating the speed limit and posting warning signs where the shoulder of the road falls off. Mr. Lang stated that the road is getting more traffic and the township should take action as quickly as possible. Mrs. Gowen stated that the speed limit along Westbourne Road is 25 MPH. Mr. Rossiter agreed to follow up on Mr. Lang's recommendation.

Thornbury Park Center – Consultants
Discussion on hiring a qualified realtor or consultant to secure a tenant for the former Brightside Market took place. The Board recommended that the township should look into interviewing several professional realtors and consultants for the purpose of finding a qualified tenant,

and in addition develop an appropriate lease package. It was agreed to hold a work session on April 15, 197 [sic] at 5:30 P.M. to meet with Weichert Realtors, R. J. Waters & Associates, Lou Termini and Thomas Spackman.

Bill Approval

A motion was made, seconded (RM/PG) and carried to approve the bill list as presented.

Announcements

Historic Preservation Committee will meet on Monday, April 7, 1997 at 7:30 P.M.

Thornbury Township, Delaware County, will meet April 16, 1997 at 7:00 P.M. to discuss the "R-3 High Density Ordinance impacting the eastern section of the Dallett tract.

Cheyney University – Inauguration of the President – April 19, 1997 at 11:00 P.M. Mr. Rossiter stated that Mr. Wilson will represent the Township.

Zoning Hearing Board – date to be determined to hear Echo Hill II zoning variance request.

Brandywine Battlefield Park Visitor's Center, April 20, 1997 at 3:00 P.M.

Other Business

Mr. Rossiter reported that a pre-construction meeting for Phase 7 was held. Mr. Gregory Balbirnie of Robert Bruce Realtors expects to start building as soon as Hovnanian paves Militia Hill Road. Mr. Rossiter stated that applicant asked if the Design Review Committee (DRC) wished to review their plans. Mr. Lang stated he would like the applicant to provide some advance input. Mr. Lang requested that the developer submit 8 scale elevations and plan view to the DRC prior to meeting with the developer on Phase 7's architectural plans.

Mr. Schmidt stated that every two weeks there is supposed to be a review on the construction progress of Bridlewood Farm. Mr. Rossiter agreed that a pre-construction meeting needs to be held and that he would contact the applicant to request a meeting.

Adjournment – A motion was made, seconded (RM/PG) and carried to adjourn at 9:37 P.M.

Respectfully submitted,

/s/ Constance Dulin
Constance Dulin
Township Secretary

EXHIBIT 7

Minutes, April 9, 1997

Mr. Miller requested Mr. Richman and Mr. Speidel to review the sewage agreement ordinance package sent by DEP and report back to the Commission on their findings. Mr. Miller stated that further study and some initial reaction is needed to determine whether to go forward with this ordinance.

Landscapes

Mr. Miller reported that Mr. Eichman, Mrs. Iacovelli, Mr. Wilson, Mr. Rossiter and himself met with Mr. Ray Sachs from the Chester County Planning Commission (CCPC) and reviewed his report on March 20, 1997. Mr. Sachs stated that the township's Comprehensive Plan was basically consistent in terms of goals, etc., however felt the plan was old and incomplete. The County has the funds to update the township's Comprehensive Plan. Mr. Miller recommended amending the Comprehensive Plan to include the township's Open Space Plan. At present there are two separate plans that should be incorporated. Mr. Sachs suggested that the township's Cluster Ordinance could be improved, and also that Thornbury should review the method of handling storm water discharge and recommended a more natural ground water approach. Mr. Miller stated that another suggestion was that the Subdivision Ordinance could include an open space requirement for each new subdivision that is submitted. If the developer does not want to provide open space then the applicant would have to pay a one time fee that would fund other open space areas.

Mr. Eichman questioned the possibility of soil contamination in the open space areas that the township is acquiring. Mr. Rossiter replied that the Dallett contract provides

that the township go through a "due diligence" of a Phase One, if the site is contaminated, the township does not assume the purchase.

Mr. Miller asked Mr. Heinzelmann and Mr. Sweeney to focus on "ordinance language". The need for this focus has been a result of problems that have come to light during subdivision review, and one example would be the Pohl tract that allowed the conveyance of sewage from one lot onto another property.

Other

Zoning Hearing Board – Mr. Miller reported that Echo Hill II has made application to the Zoning Hearing Board. A date for the hearing has not been determined.

Faucett Tract – Mr. Miller updated the members on a presentation to the Board of Supervisors by R. J. waters & Associates to develop the Faucett tract which is located at the northeast corner of Route 202 and Dilworthtown Road. Approximately five commercial acres are located in Birmingham Township, and twenty +/- agricultural/ residential acres are located in Thornbury Township. The developer proposes building a shopping center similar to the Shoppes at Longwood in Kennett Township and has asked about rezoning the property in Thornbury to a commercial use. Mr. Miller reported that the Supervisors reaction was lukewarm to the proposal.

EXHIBIT 8

THORNBURY TOWNSHIP, CHESTER COUNTY BOARD OF SUPERVISORS MEETING APRIL 15, 1997

In attendance were Supervisors Charles A. W. Wilson (Chairman) J. Christopher Lang (Vice-Chairman), Paula Gowen, Robert MacDonnell and William Schmidt; Robert Adams (Solicitor); Michael Conrad (Yerkes Associates); Ronald Miller and Robert Eichman (Planning Commission); Patricia Dewey and D. J. Tindall (Park & Recreation); Mahlon Rossiter (Township Manager) and approximately guests.

Mr. Wilson led the Pledge of Allegiance and called the meeting to order at 7:34 P.M.

Minutes Approval
A motion was made, seconded (CL/WS) and carried to approve the minutes of April 1, 1997. Mr. Wilson abstained.

Police Report
Chief John Dumond of the Westtown-East Goshen Police Department (WEGO) reported low police activity in the month of March with a total of 64 calls, many of which were residential alarms. Chief Dumond reviewed the prisoner escape operation and advised that there would be a joint meeting to critique the operation. Mr. Lang questioned the communication procedures and noted that the township had not been properly advised of the incident.

Mr. MacDonnell read a letter of commendation addressed to the Chief by the Board of Supervisors in appreciation of the actions and successful conclusion of the operations by WEGO.

Brinton Ridge Apartments – Phase 8
Mrs. Rossi was present to represent the Bozzuto Group. Mr. Adams informed the Board of Supervisors that he had completed two updated corrections to the Conditions of Final Approval from the last meeting and that the documents are ready for signature. The Board of Supervisors agreed to execute the "Revised" Conditions of Approval that were approved April 1, 1997.

Dallett – Proposed Agreement of Sale
Mr. Adams stated that he had examined the proposed agreement and found it was complete and well written, but that he could not offer any final conclusion until the "exhibits" referred to were obtained. Mr. Lang stated that the contingency period of thirty days to investigate possible environmental issues was too restrictive and asked to have the agreement language adjusted, or the time extended, to give the township more time to determine if remediation was necessary. Mr. Rossiter was requested to communicate with the attorneys who had prepared the agreement to expedite the submission of all "exhibits" and to address the contingency issue mentioned by Mr. Lang.

Bridlewood Farm – Phase 3B
Mary Ann Rossi (attorney), Elizabeth Hurtusbie, Esq. and Zack Coburn (K. Hovnanian) and Gary Vecchio (Taylor, Wiseman & Taylor) were present to represent the applicant K. Hovnanian & Companies.

Lengthy dialogue followed regarding Phase 3B. [*The entire discussion and proceedings of the Phase 3B decision were documented by a Court Reporter and the testimony offered is on file at the township office.*] The Board adjourned to executive session to confer with Mr. Adams on some of the legal issues associated with this application. Mrs. Rossi requested that the Board vote on 3B as proposed by the

Planning Commission with amendments. A motion was made and seconded (PG/WS) for approval of Phase 3B with the conditions as submitted by the Planning Commission and as amended, and to include the exclusion of 6B. Mr. Wilson – In Favor. Mr. Lang – Opposed. Mr. MacDonnell – Abstained. Mr. Adams clarified for the record that the March 13, 1997 final draft of the Conditions of Final Approval that has been under consideraton [sic], and that draft, including the waiver attached thereto as the last item, minus the condition 6B is the decision of the Board. Mr. Wilson stated that is correct.

Executive Session

Mr. Wilson announced that the Board had a meeting preceding the Supervisors public meeting at 5:30 P.M. The purpose of the executive session was to interview Realtors and Consultants to assist the township in the leasing of the empty convenience store adjacent to the Westtown Post Office. Following the interviews the Board arrived at a decision to allow Mr. Louis Termini of Westtown Associates, Inc., West Chester, a forty-five day period to find a suitable tenant at the commercial center.

Park & Recreation Commission

Mrs. Dewey advised the Board that Mr. Thomas Comitta was still in the process of preparing bid documents and has been delayed by the receipt of suitable contour mapping. Mrs. Dewey asked the Board for permission to have the plan reviewed by a sub-committee consisting of Mr. Rossiter, Mr. Comitta and herself and then forwarding to the Chester County Parks & Recreation for review. After comments are received from the County, the Supervisors will have an opportunity to review and approve the entire bid package.

Mrs. Dewey announced that a park clean up activity was scheduled for April 27, 1997 from 1:00 to 3:00 P.M. at the Thornbury Park Center. Volunteers would be solicited by means of a flyer to be prepared by the township office.

Resolution 1997-3-A

Mr. Rossiter explained that with the adoption of Ordinance 1996-6 governing Fences, Walls and Screens, it has become necessary for residents to file for a building permit. Since there was no fee schedule to provide reimbursement for the inspections, this Resolution was being proposed to recover those costs.

A motion was made, seconded (PG/WS) and unanimously carried to adopt Resolution 1997-3-A.

Planning Commission

Mr. Miller reported on current activity within the Planning Commission.

Phase 3A – Bridlewood Farm – Mr. Miller informed the Board that the applicant has agreed to "conditions" suggested by the Planning Commission and is investigating an easement onto the adjacent Johnson property. Mr. Miller and Mr. John Hall will meet to draw up the final Phase 3A Conditions of Final Approval for review by the Planning Commission at their meeting on May 14, 1997, and will be formally presented to the Supervisors for action at their May 20, 1997 meeting.

Phase 5A – Bridlewood Farm – Mr. Miller reported that the review is scheduled to start with the Commission's May 14th meeting.

Mr. Miller questioned the status of K. Hovnanian's position regarding the use of Thomas Comitta Associates. Mrs. Rossi replied that the position was unclear at this time.

Mr. MacDonnell requested Mr. Rossiter to write a letter to Hovnanian stating the Board's position on using Mr. Comitta and expecting payment.

Sewage Enforcement Ordinance – Mr. Miller related that preparation is still in the discussion stage, however the Commission will follow through.

Treasurer's Report
A motion was made, seconded (PS/WS) and unanimously carried to approve the Treasurer's Report.

Bill Approval
A motion was made, seconded (WS/RM) and unanimously carried to approve the bill list as submitted.

Public Comment
Mr. MacDonnell requested the township office get samples of other township ordinances limiting hours of construction operation, particularly on weekends. Comments have been received concerning early hours of weekend operation at Bridlewood Farm.

Mr. MacDonnell led a Board discussion on the merits of R. J. Waters & Associates presentation for rezoning the property adjacent to Dilworthtown Road and Route 202 intersection. There was a general consensus that the Board was not interested in rezoning for such a massive operation. Mr. Rossiter was requested to check with Birmingham Township to learn how the proposal from the developer was received by Birmingham, and advise R. J. Waters of the Board's low interest in this project.

Thorncroft Woods
Mr. Ron Hewes, builder and developer of Thorncroft Woods, again adddressed [sic] the Board regarding the proposal to make the private road on this site public. The cost of

building this road to township specifications would result in $65,000 additional cost. Mr. Hewes informed the Board that he had determined that there was room to provide for two more lots on this site which had been previously held as open space between two pods of development. Mr. Hewes proposed that if these two lots could be included as buildable lots on the plan, that he would be able to generate sufficient revenues to build the road to township specifications. Mr. Wilson encouraged Mr. Hewes to present these fact in a sketch plan to the Planning Commission at their next meeting for consideration.

Adjournment

A motion was made, seconded (PG/WS) and unanimously carried to adjourn the meeting at 10:55 P.M.

Respectfully submitted

Mahlon Rossiter
Township Manager

EXHIBIT 9

THORNBURY TOWNSHIP, CHESTER COUNTY
BOARD OF SUPERVISORS MEETING
MAY 6, 1997

In attendance were Supervisors Charles A. W. Wilson (Chairman), Robert MacDonnell and William Schmidt; Robert Adams (Solicitor), Ronald Miller and Robert Eichman (Planning Commission), D. J. Tindall (Park & Recreation) and Mahlon Rossiter (Township Manager).

Mr. Wilson led the Pledge of Allegiance and called the meeting to order at 7:43 P.M.

Minutes Approval
A motion was made, seconded (RM/WS) and carried to approve the minutes of April 15, 1997.

Bridlewood Farm
Proposed Resolution to Amend Township's Current Act 537 Plan – The Board discussed Mr. David Linahan of Yerkes Associates' letter dated 5/5/97 regarding the township's current approved Act 537 plan for the Bridlewood Farm project from a seasonal spray irrigation/stream discharge system to a year round stream discharge system. Mr. Linahan stated that there is no requirement to use spray irrigation, only the existence of local preferences to favor the spray method over stream discharge. Mr. Linahan recommended that the Township distribute a copy of the proposed resolution to the Chester County Planning Commission (CCPC), the Chester County Health Department (CCHD) and the Thornbury Township Planning Commission (TTPC), as well as advertise in a newspaper of general circulation, that the township proposes to amend its Act 537 Plan. Mr. Schmidt stated the plan was designed for spray irrigation but stream discharge could

be more advantageous. Mr. MacDonnell recommended moving forward with advertising the proposal to amend the Act 537 Plan and request Mr. Linahan testify as to what the differences are between spray irrigation and stream discharge in order for the Board to react. A motion was made, seconded (WS/RM) and carried to advertise and move forward with the proposed Resolution to amend the Township's Act 537 Plan.

Roadmaster

Mr. Schmidt stated every two years the township goes out for road work bids. The bid includes general road work such as patching pot holes, replacing signs, etc. Mr. Schmidt reported that four bids were submitted and they were opened and read as follows:

Rittenbaugh, Inc., Phoenixville, PA: Front End Loader/ Backhoe $50/Hr, Dump Truck (10 Ton) $45/Hr, (3 Ton) $20/ Hr, Skilled Labor $30/Hr, Unskilled Labor $25/Hr.

Martin Bros Excavation, Lima, PA: Front End Loader/ Backhoe $35/Hr, Dump Truck (10 Ton) $30/Hr, (3 Ton) $20/ Hr, Skilled Labor $18/Hr, Unskilled Labor $15/Hr.

Steve Botella, Glen Mills, PA: Front End Loader/Backhoe $24.75/Hr, Dump Truck (10 Ton) $22.50/Hr, (3 Ton) $19.50/ Hr, Skilled Labor $20.50/Hr, Unskilled Labor $12.50/Hr.

John Neff Construction, Westtown, PA: Front End Loader/ Backhoe (A) $25/Hr – (B) $20/Hr, Dump Truck (33,000 GVW)) $20Hr, (3 Ton) $15/Hr, Skilled Labor (A) $15/Hr – (B) $13.50/Hr, Unskilled Labor (A) $12.50/Hr – (B) $10/Hr.

After a review and tabulation of the proposals, a motion was made, seconded (WS/RM) and carried to award the road work contract for the years 1997/1998 to the low bidder, John Neff Construction.

South New Street

Mr. Rossiter informed the Board that improvements to South New Street in Birmingham Township consist of widening the road to a 30' paved surface. The widening stops abruptly at the township line with no tapering or transition to the original 16' cartway in Thornbury Township. Mr. Rossiter asked Yerkes Associates (YA) to inspect the road construction. Mr. Giannantonio of YA reported that increased water discharges resulting from the widening will have a major impact on the stream embankment and could undermine the end of the road culvert that exists there now. If no storm drainage is provided to carry the runoff that will be generated by 2,500 L.F. of roadway (1600' in Birmingham, 900' in Thornbury) major erosion will occur wherever that flow leaves the paved surface. Mr. Giannantonio consulted with Jim Hadfield (Birmingham's engineer) and requested Birmingham put in an additional drain so that any water would not be from the top of the hill. Mr. Rossiter stated that Thornbury must widen S. New Street to eliminate the funnel effect. Mr. Giannantonio felt the cheapest way to do this work is to have the contractor (now working on New Street) to continue the work into Thornbury. The Board of Supervisors authorized Mr. Rossiter to follow through on obtaining a bid from the Birmingham contractor for the widening of S. New Street.

Mellon Bank Business

Disposition of Loans for $550,000 and $375,000 – Mr. Rossiter requested the Board to make a decision on where to deposit the funds which will be received May 7, 1997. Mr. Rossiter suggested investing the money in a three month CD at a rate of 5.45% in Mellon Bank. Mr. MacDonnell requested Mr. Rossiter to investigate other lenders to try and negotiate a better rate of interest for the

township. Mr. Rossiter and the Board agreed with Mr. MacDonnell.

Change of Banking from PLIGIT & 1st National – Mr. Rossiter recommended switching the township's depository to Mellon Bank. There are more advantages and the cost and interest are the same. Mr. Wilson agreed that the change to Mellon should make record keeping easier for the township. A motion was made, seconded (CW/RM) and carried to remove the township's monies from PLIGIT and 1st National Bank to Mellon Bank.

Thornbury Commercial Center – Lease Proposal – Mr. Wilson stated that the Board would be going into an Executive Session regarding real estate issues following the meeting.

Berkheimer Associates Contract – Letter from Rick Smith of East Goshen Township regarding the contract with Berkheimer Associates that expires December 31, 1997. Mr. Smith asked Thornbury to notify him by the end May stating whether the township would be interested in retaining Berkheimer Associates for collection of the Earned Income Tax. A motion was made, seconded (WS/RM) and carried to extend the contract with Berkheimer Associates for the collection of the township's Earned Income Tax for 1998

Chester County Task Force to Prevent Violence – A letter was read from state Representative Elinor Taylor requesting the township's support to explore ways to prevent violence in Chester County. The Conference will be held on October 22, 1997 at the Holiday Inn in Lionville. Mr. Wilson suggested that the township purchase two lunches at $10 each to support the Conference

Thorncroft Woods
Ron Hewes (developer) and Wayne Grafton (engineer) were present to represent the Thorncroft Woods subdivision.

Mr. Grafton itemized the changes to the original subdivision plan of Thorncroft Woods. The revised sketch plan dated May 5, 1997 shows (1) a 20' cartway with rolled curbing, (2) the island in the middle of the cul-de-sac has been reduced in size at the request of the Fire Marshal, (3) the plan has gone from 8 lots to 10 lots and (4) there will be additional inlets and basins. Mr. Grafton stated the Ordinance calls for a 24' wide cartway with rolled curbs, however, the subdivision enters onto Dilworthtown Road which is only 16' wide. There was discussion that Mr. Hewes might consider an 18' cartway as opposed to a 20' width to cut down on impervious coverage. It was the Board's opinion that the cul-de-sac should retain the center island and that an 18' cartway with rolled curbs and additional inlets would be preferred over the 20' wide road, but Yerkes Associates would need to validate the proposal. Mr. Hewes thanked the Supervisors and informed the Board that the sketch plan will be presented to the Planning Commission on May 14, 1997.

Treasurer's Report & Bill Approval – A motion was made, seconded (RM/WS) and carried to approve the Treasurer's Report and Bill List.

Greater West Chester Intergovernmental Committee
Mr. Wilson and Mr. Rossiter stated they would try to attend the meeting on May 8, 1997.

Executive Session The meeting was temporarily adjourned at 8:25 and reconvened at 8:50 PM.

Faucett Tract

Randy Schauer (Attorney), Robert Plucienik (Chester Valley Engineers), Kevin Lahn and Robert Waters (Water & Associates – Developer) were present to represent the proposed shopping center at Route 202 and Dilworthtown Road.

Mr. Schauer reported that Waters & Associates (W&A) went before the Birmingham Township Planning Commission (BTPC) to present their plans for a shopping center and were generally well received. The BTPC stated they would like to have the historic structure restored as a restaurant. Mr. Schauer stated that the restaurants they have talked to are not interested and desire a building that is in harmony with the shopping center. There would be competition from the Dilworthtown Inn across the street, and there would be difficulty in securing a liquor license. W&A has retained an architect to study the structures on the site and meet with the Birmingham Historical Board. Mr. Schauer told the Board that it is their intention to develop the Birmingham property even if they do not build in Thornbury.

Mr. Lahn discussed their study and detailed how a commercial center would have a positive economic impact on the township versus more residential homes. Mr. Lahn presented a landscape sketch plan of the site and explained that the W&A proposes a 50'-75' buffer along Route 202 compared to the Longwood Shopping Center's 25' buffer. Mr. Lahn recommended that the proposed street from Dilworthtown Road into Penn Oaks should run behind the center. W&A met with Mr. Stoltzfus and Mr. Iacobucci and neither of them thought they would benefit from the proposed road. Mr. Lahn told the Board if the township rezones the property to commercial and decides

against building the road, in return W&A would make a donation to the township. Mr. Lahn discussed the need for another super market in this vicinity due to the increase of new home construction surrounding Route 202. Mr. Lahn stated that parking is already a problem at Westtown Village and Glen Eagle and that Thornbury/Birmingham could easily support a super market and shopping center. Mr. Lahn reported that W&A manage twenty shopping centers, and the Thornbury proposal has the lowest square foot density per acre: Westtown is 7600 s.f. per acre, Glen Eagle is 6100 s.f per acre, Longwood is 5400 s.f per acre and Thornbury is 4800 s.f per acre. Mr. Lahn explained that the Commons at Thornbury cannot accommodate an anchor store because the parcel is not large enough and that an anchor is needed to attract other retailers.

Mr. Schauer informed the Board that W&A proposes to file a petition for rezoning. Mr. Schmidt stated that he did not see a need for another shopping center in the township and that the only way he would have any interest is for the township to acquire a similar piece of property for open space; further, historic buildings are being sacrificed and the open green space would be turned into an impervious area.

Mr. MacDonnell agreed that the Faucett site does not have to be developed, nor is there a need to rezone the tract. The message is that the Board is not a particularly receptive audience.

Mr. Wilson stated that the Faucett site is at the remote corner of the township and the Board is not beyond being convinced, however, the Supervisors have to really believe there would be a true benefit to the township for a trade off to allow this to be rezoned.

Planning Commission
Mr. Miller reported that the Planning Commission meets on May 14, 1997. Mr. Miller asked the Board if the Commission can continue using Mr. Comitta as a consultant for the Bridlewood review. Mr. Wilson stated that Mr. Comitta is the township's consultant and Mr. Comitta will continue.

Adjournment
A motion was made, seconded (CW/RM) and carried to adjourn the meeting at 10:00 P.M.

Respectfully submitted,

Constance T. Dulin
Township Secretary

EXHIBIT 10

THORNBURY TOWNSHIP, CHESTER COUNTY
BOARD OF SUPERVISORS MEETING
JUNE 17, 1997

In attendance were Supervisors Charles A. W. Wilson (Chairman), Paula Gowen and William Schmidt; Robert Adams (Solicitor), David Linahan (Yerkes Associates), Robert Eichman (Planning Commission), Patricia Dewey and DJ Tinall (Park & Recreation), Thomas Comitta (Land Planner) and Mahlon Rossiter (Township Manager).

Mr. Wilson led the Pledge of Allegiance and called the meeting to order at 7:34 P.M.

Minutes Approval
A motion was made and seconded (RM/CW) and carried to approve the minutes of the meetings held May 27, 1997 and June 3, 1997.

Police Report
Detective Sgt. Gorman presented the Monthly Activity Report for May 1997. In response to Mr. MacDonnell's inquiry, Sgt. Gorman confirmed that the total calls for all three townships are up from last year. Sgt. Gorman agreed and explained that there has been an increase in the number of 9-1-1 calls as well as a growth in population.

Brandywine at Thornbury (Bridlewood Farm)
Mary Ann Rossi (Attorney) and Zack Coburn (K. Hovnanian) were present on behalf of the applicant, K. Hovnanian Companies of PA, Inc.

Final Sewage Facilities Agreement – Mrs. Rossi stated the agreement has been reviewed by Yerkes Associates (YA) and approved previously by the Supervisors. Mrs. Rossi informed the Board that Page 7 had been revised. In the

event the applicant or Homeowners' Association receives an offer from a PUC-regulated utility company for the purchase of the sewage system, a thirty (30) day written notice shall be given to the township to exercise its right to make a decision regarding acquisition of the plant. Mr. Wilson and Mr. MacDonnell questioned whether the thirty day notice would provide adequate time for the township to react. Mr. Adams stated that the document is acceptable but cannot be executed until the Bond is in place. Mr. Linahan reported that YA provided the township and applicant a cost estimate for the Bond in the amount of $1,795,200. A motion was made, seconded (WS/PG) and carried to approve the Final Sewage Facilities Agreement contingent upon changing Page 7, Paragraph 14's thirty day (30) notice to a sixty (60) day notice. Upon receipt of the executed Facilities Agreement and Bond by the applicant, and review by the Solicitor, Mr. Wilson was authorized to sign the Agreement on behalf of the Board.

Mrs. Rossi informed the Board that it will not be necessary to sign final plans for Phase 2. Phase 2 is a lot that was created for the sewage facility and is part of Phase 1.

Mrs. Rossi stated that the applicant is amending the Master Declaration Agreement to conform with the new Uniform Planned Communities Act and also the proposed name change from Bridlewood Farm to Brandywine at Thornbury.

Phase 3A

Mrs. Rossi requested the Board to sign the plans as approved for Phase 3A even though the revisions referenced in her letter of June 17, 1997 to the Board are not completed. Mr. Adams recommended holding the plans in escrow and not to release them for recording until Mr.

Conrad determines the bond amount for the Road Improvements Agreement and confirms that the revisions to the plan have been made to comply with the Conditions. Mrs. Rossi stated that the applicant cannot record the deeds until the plan is recorded. A motion was made, seconded (PG/WS) and carried to sign the plans for Phase 3A as recommended by Mr. Adams, and to approve the Road and Improvement Construction Agreement and Bond for execution when presented. Mr. Wilson in favor.

Fence Proposal

Mr. Coburn informed the Board that the applicant is proposing to fence in the rear properties of the townhomes on three sides for privacy. Mr. Coburn stated that the fences would go back 12' and across the width of the home for 25'. The fence would start at a height of 6' from the rear of the home and taper down to 4' high with a gate. Mr. Coburn asked the Board how would they like the applicant to proceed on this request. Mrs. Gowen questioned if this is something people want. Mr. Wilson expressed surprise at the proposal of closing in the backs of the homes since the applicant had been advocating open space behind all of the houses. Mr. Adams asked Mrs. Rossi if the Declaration prohibits fencing. Mrs. Rossi responded that she would review the Declaration. After some discussion the Board agreed that the fencing proposal should go through the Design Review Committee. Mr. Coburn asked if the Board would object to a stand alone privacy fence. The Board did not have an objection to a stand alone fence.

Signage

Mrs. Rossi stated that the applicant is proposing two identification signs on the Route 202 entrance of 10' X 50', and two identification signs on the Route 926 entrance of

6' X 20'. In addition, one community identification sign at the Martingale Road and Route 202 access of 6' X 20'. Mrs. Rossi requested the Board to waive the requirements of Section 1210.4.F that limits development name signs to one per entrance not to exceed 4' in height. Mrs. Rossi commented that Bozzuto and Hovnanian will share the community identification signs. Mrs. Gowen stated that she is against permanent signs. Mr. MacDonnell opposed the size of the signs. Mr. Schmidt responded that the signs dominate the landscape and breaks the township into small cliquish segments. The signs should be tasteful and understated. Mr. Gowen told the applicant that she would not object to "temporary" signage to introduce home buyers to the community. Mrs. Rossi thanked the Board for their feedback. Mr. Adams stated that 50 s.f. should be the maximum size.

Act 537 Plan

Mr. Wilson stated that YA prepared a Resolution for Plan Revision to amend the township's current approved Act 537 for Bridlewood Farm from a seasonal spray irrigation/stream discharge system to a year round stream discharge system. Mr. Rossiter reported that Mr. Linahan and himself met with Wayne Clapp, Maria Gorman and Heidi Hoegger of the Chester County Health Department (CCHD) to discuss the plan revision. The County and State are encouraging spray irrigation but cannot regulate the township to comply. Mr. Linahan and Mr. Adams cautioned that the plan revision could result in adjacent land owners and neighboring municipalities appealing full stream discharge, and that the township could incur legal costs in defending itself.

Mr. Linahan posted a plan that showed the five zones earmarked for spray irrigation. Seven zones are projected,

but five zones have permits at this time. Mr. Linahan suggested that if the township wants to go forward with the revision Thornbury must advertise the Resolution, formally send it to the Chester County Planning Commission, CCHD and the Township Planning Commission. Mr. MacDonnell recommended that a substantial presentation statement prepared by the township should accompany the amendment request. Mr. Linahan noted that all comments received by the township must be in writing, and Thornbury Township in turn must respond in writing, adopt the Resolution, present a narrative from the township and send the entire package to the Department of Environmental Protection (DEP). DEP has 120 days to respond. Mrs. Rossi stated that the developer has no position on the Plan Revision. The applicant has an approved system and is ready and willing to offer dedication of the facility to the township. Mrs. Gowen asked if full stream discharge would elevate the stream. Mr. Linahan replied that the elevation would increase only 3/16" which is the thickness of a match stick and that there would be no hydraulic impact.

Mr. Linahan suggested if the township stays with spray irrigation they could look into the beneficial use of the spray irrigation, such as watering the berms and the green areas. Mrs. Rossi stated if the direction from the township is to install the spray heads in the berm instead of a field, she is confident that her client would consider it. Mr. Linahan stated that if the township goes with the Act 537 Plan Revision, the spray fields should be eliminated altogether.

Mr. Wilson recommended formation of sub-committee to review this issue prior to any further action. A sub-committee

of the following members was formed: Mr. MacDonnell, Mr. Schmidt, Mrs. Tindall and Mr. Rossiter.

Park & Recreation Commission

Mrs. Dewey reported that Waters & Associates (W&A) met with the Park & Recreation Commission (P&R) regarding W&A's request to rezone the Faucett tract, at the corner of Route 202 and Dilworthtown Road, to a commercial shopping center. W&A asked the Commission what they would desire as a trade off for open space to replace the Faucett tract. Mrs. Dewey stated that it is P&R's recommendation to acquire the 30 remaining acres at the Dallet tract, including the house and barn, and to have both structures stabilized.

Park Bid Proposal

Mr. Comitta reported that the bid package is ready, however, the proposal cannot be advertised for bid until the Prevailing Minimum Wage Rate is received from the Department of Labor & Industry (L&I). L&I has been taken to Court by the labor unions and issuance of a minimum wage rate is pending settlement of the appeal. Mr. Comitta requested Mr. Rossiter to talk to Mr. Adams and the county on how to proceed the Prevailing Minimum Wage dilemma.

Mr. Comitta commented that Mr. Lang proposed a more Chester County styled pavilion rather than the octagonal design by Cedar Forest Products costing $22,000 to $25,000. Mr. Lang suggested using the corn crib at Bridlewood Farm. Mr. Comitta reported that the structure was not in good shape and would be too expensive to transport. Mr. Comitta presented a redesign of the pavilion by Architect, Tim Cassidy. The Supervisors viewed the restyled pavilion with enthusiasm and stated that it

reflects the character of the Chester County. The Board stated if the cost estimate of the new pavilion design was competitive with Cedar Forest Products that the township should go ahead with Mr. Cassidy's design.

Bridlewood Farm Street Trees

Mr. Comitta reported that Hovnanian would prefer to plant the 45 proposes trees at 2-1/2" caliper versus 41 previously approved Green Mountain Sugar Maple trees between 3" to 3-1/2 caliper. Mr. Comitta commented that 4 trees will need to be moved to avoid the water line.

Thornbury Knoll

Mr. Comitta stated that Mr. Coburn recommended that he meet with Mr. Cummings and the TK residents regarding the berming and screening issue on June 24, 1997 at 5:00 P.M. Mr. Comitta questioned who was going to pay for his services. Mr. Rossiter responded that he would discuss this with Mr. Coburn and suggested that the applicant should put a dollar figure up front before proceeding further. Mr. Wilson stated that he would attend the meeting on June 24th.

Faucett Tract

Randy Schauer (Attorney), Robert Waters and Kevin Lahn (Waters & Associates) were present to discuss the Faucett Tract.

Mr. MacDonnell and Mr. Schmidt informed Waters & Associates (W&A) that they were not in favor of rezoning the tract to build another shopping center. They informed W&A that the trade off proposed by the P&R would be the absolute minimum proposal that would be considered. Mrs. Gowen stated that she did not object to a shopping center at the Faucett location but did not want to see the frontage change. Mr. Wilson agreed that a shopping center

at Route 202 and Dilworthtown Road makes sense, but shares Mr. MacDonnell and Mr. Schmidt's view to preserve the open space. Mr. Thomas Spackman asked W&A if they would have an interest in his property. Mr. Waters told the Board that they would contact the Dallett family regarding a proposed purchase. If the dollar figures justify the Dallett acquisition, W&A will present the trade off proposal to the Supervisors.

Resignation – Board of Supervisors
It was with great regret that the Supervisors accepted Mrs. Gowen's resignation, effective this date, from the Board. Mr. Wilson, Mr. MacDonnell and Mr. Schmidt thanked Mrs. Gowen for serving the township the past 7 years.

Mrs. Tindall informed Mrs. Gowen that the P&R was going the name the township tree to be planted in the park the "Paula Gowen" tree.

Public Comment
Mr. Spackman questioned the status of the silted-in stream off of S. New Street. Mr. Rossiter responded that the township is waiting for the report from YA.

Mr. Benjamin Johnson complained about the weeds at the intersection of Route 926 and S. Westtown Road. Mr. Johnson stated that the overgrowth blocks visibility when turning onto Route 926. Mr. Rossiter reported that both roads belong to PennDOT. Mr. Rossiter recommended removal of the fence at this location to insure that the grass is cut up to the macadam.

Appointment to the Board of Supervisors
Mr. Wilson stated that Mrs. Gowen had given the Board advanced notice of her resignation and they had the

opportunity to consider a candidate to fill the vacancy. A motion was made, seconded (WS/RM) and carried to nominate Patricia Dewey to fill the vacancy created by the resignation of Mrs. Gowen. The Board members welcomed Mrs. Dewey. Mrs. Dewey told the Board that she was looking forward to working with them.

Noise Ordinance

Mr. MacDonnell remarked that as Bridlewood intensifies the need for a noise ordinance becomes more apparent. Mr. MacDonnell stated that he has reviewed a noise ordinance from Radnor Township and recommended that Thornbury use their ordinance as a model. Mr. MacDonnell told the Board that he was going to make a few changes and then forward the sample ordinance to Mr. Adams to draft a similar one and present it for consideration. The Supervisors agreed with Mr. MacDonnell's recommendation.

Adjournment

There being no further business, a motion was made, seconded (WS/PG) and carried to adjourn the public portion of the meeting at 10:22 P.M. Mr. Wilson announced that the Board was going into executive session.

Respectfully submitted,

Constance Dulin
Township Secretary

EXHIBIT 11

CHESTER COUNTY THORNBURY TOWNSHIP

PARKS & RECREATION

MINUTES

June 4, 1997

Present: D. J. Tindall, Karin Calistri, Patricia Dewey, Helene MacLaughlin, George Wood

Absent: Pete Clark

MINUTES

It was moved and seconded that minutes of May 7 meeting be approved. Patricia Dewey abstained, she was not at the May 7 meeting.

OLD BUSINESS

Cliff Kenneck Resigned and an official letter of resignation is needed.

Park Rules

Thornbury Park Planning Details

County recommends a portion of the trail be moved because map indicated it was in wetlands.

$40,000.00 has been spent on engineering for the park to date.

End of field area should be left as is and mowed twice a year.

A good sized white oak has been located in New Jersey for the park.

Patricia suggested that some planned red maples be replaced with sugar maples for park. She also suggested that crab apples be removed. All members agreed.

Still trying to decide where to plant grove of trees.

Consultant suggested we change pavilion design. He feels an octagon shape is not representative of Chester county. He recommends a different design, perhaps using wood from a vacant barn. All agreed an original design would be preferable if cost was equivalent.

Patricia recommended volleyball court be moved nearer the pavilion area and away from the parking lot. All members agreed.
Committee decided to move volleyball court and to get a formal proposal for redesign of pavilion.

Proposed Development at 202 and Dilworthtown Road

A 150,000 square foot shopping center with a couple of restaurants is being proposed for the southeast corner of 202 and Dilworthtown Road.

The developers ask for suggestions from Park & Recreation committee to make the zoning change more favorable for the township.

The Parks & Rec committee voted that purchasing an additional 30 acres of the Dallett tract with the buildings would add to our desire to preserve open space. It was also

felt that the property could be leased for farming after being restored.

Developers asked the committee to review the possibility of having the Dallett tract property restored and to make a recommendation to the supervisors.

The committee recommendation is to have the developer purchase the Dallet tract with the house and outbuildings restored.

Activities

Christmas

George reiterated his suggestion from last meeting that we have tree decorations, choir, Santa and refreshments. It was agreed that the event be held on December 13 from 3:00-5:30. He suggested local schools be contacted to ask if the children would like to make decorations for tree. Also suggested kids have a train ride with Santa prior to refreshments and lighting tree. No gifts from Santa, have kids bring Christmas lists. We may have to pay some money for the train ride in lieu of charging kids and parents for the ride.

We have a budget of $495.00 for Christmas.

It was decided that we would mail Christmas cards with an invitation to the Christmas events for the township in early December would be mailed to township residents.

DJ will call about the Christmas tree to be planted (spruce).

We need good publicity for this event.

Fall Event

No discussion.

NEW BUSINESS

Recommended that part of the August 6 meeting be devoted to "Friends of the Park". We will put in the next newsletter an invitation for them to attend the meeting to discuss plans for park.

Jean Berlin has expressed an interest in joining the committee.

It was suggested that the vacancy on Parks & Rec be advertised on the Post Office bulletin board.

Next meeting scheduled for July 2.

ADJOURNMENT

Meeting was adjourned at 10:15.

Respectfully Submitted,

Peter Clark
Parks & Recreation

EXHIBIT 12

IN RE:	:	**BEFORE THE BOARD OF SUPERVISORS**
APPLICATION OF	:	
BIRMINGHAM DEVCO	:	**OF THORNBURY TOWNSHIP**
	:	
	:	**CHESTER COUNTY, PENNSYLVANIA**

DECISION

Birmingham Devco (hereinafter "Applicant" has filed an application for conditional use by which it seeks approval of the Board of Supervisors (hereinafter "Board") of Thornbury Township (hereinafter "Township") to develop a neighborhood shopping center on a property located at the northeast corner of Route 202 and Dilworthtown Road, generally referred to and known as the "Faucett tract."

Hearings on the application were held at the Thornbury Township Building on June 16 and June 18, 1998. Charles A. W. Wilson, Chairman, William A. Schmidt, J. Christopher Lang, Robert MacDonnell and Patricia Dewey heard the application for the Board. Robert F. Adams, Esquire, appeared as the Board's solicitor. The Applicant was represented by Randall C. Schauer, Esquire. Also appearing of record were Joseph E. Brion, Esquire, representing Birmingham Township and Fronefield Crawford, Jr., Esquire, representing Penn Oaks Estates, Inc. No other parties appeared of record.

After receiving the evidence presented by the Applicant, and having reviewed the same, the Board makes the following:

Findings of Fact

1. Notice of the hearing was duly published in the Daily Local News and posted at the Township Building, as required by law.

2. The hearing was duly convened, and the Applicant presented evidence in support of the application.

3. Birmingham Devco is a general partnership and the equitable owner of the Faucett tract which will serve as the developer of the property which is the subject of the application. The leasing and management entity for the project is R.J. Waters & Associates, Inc. Kevin Lahn, Vice President of R.J. Waters and a general partner of the Applicant, testified on behalf of the Applicant.

4. The property which is intended to be developed by the Applicant as a neighborhood shopping center (hereinafter "Property") consists of a total of 25.7 acres, located in both Thornbury and Birmingham Townships.

5. The portion of the Property which is in Thornbury Township contains approximately 19.9 acres. The balance of the 25.7-acre parcel is located in Birmingham Township and has frontage along the northerly property line of the project on Route 202.

6. The entire Property to be developed appears in a sketch plan entitled "Shoppes at Dilworthtown Crossing" marked Exhibit A-1 at the hearing.

7. The Applicant proposes to develop a high quality up-scale neighborhood shopping center consisting of approximately 122,000 square feet in total area.

8. The Applicant proposes to construct 4 pad sites in Birmingham Township along Route 202, containing 17,950

square feet, and larger retail stores to the rear in Thornbury Township containing 104,060 feet of floor area.

9. The pad sites in Birmingham Township are proposed to be one for general retail use, one as a drive-in bank and two restaurants (a drive-thru type and a sit-down type of restaurant.

10. The Thornbury portion will contain three anchor uses, including a food store of approximately 50,000 square feet, a drug store and possibly a book store. In addition, the Applicant proposes several high quality retail type stores, such as hairstylist, camera store, dry cleaner, jewelry store and similar uses.

11. The portion of the Property in the Township is currently zoned A Agricultural and Residential District. The portion of the Property in Birmingham Township is zoned C-1 Highway Commercial.

12. The Applicant has, in addition to filing a conditional use application, filed an application for zoning amendment to the B Business District regulations of the Thornbury Township Zoning Ordinance (hereinafter "Zoning Ordinance") and for an amendment to the Zoning Map of the Township by which the Property will be rezoned to B Business District (Exhibit B-2). The proposed zoning amendment was attached as Exhibit B-2.

13. The Applicant also filed an amendment to its application for amendment to the Zoning Ordinance and Map by which a Co-Applicant, Penn Oaks Estates, Inc., joined in the application, seeking the same zoning modifications for the Co-Applicant's 80,000-square foot property abutting the Applicant's Property to the east. That amendment is made part of this record as Exhibit B-3.

14. The proposed Zoning Ordinance and Map amendments were also advertised for hearing concurrently with the hearing on the conditional use application and the Zoning Ordinance amendment advertised for consideration took the form as set forth in Exhibit B-4.

15. At the hearing of June 16, 1998, the Board voted unanimously to strike the petition for rezoning as it relates to the property of the Co-Applicant, Penn Oaks, Estates, Inc. and limited its consideration of the zoning changes to the Applicant's 19.9-acre Property.

16. The proposed zoning amendments, in addition to the change of zoning classification from A Agricultural and Residential to B Business District include the following: changes to the permitted uses under § 155-35 by the introduction of shopping center development over 30,000 square feet by conditional use; the deletion of the special regulations relating to commercial development under § 155-37; the modification of the parking regulations contained in § 155-39.E. by the addition of the requirement of one parking space for every 200 square feet of sales area associated with the shopping center; and the modification of the sign regulations of § 155-51.B. by the introduction of regulations for signs permitted in conjunction with shopping center development, including regulations for ground (pylon) signs and under-canopy signs.

17. The Property is bounded on the north by three tracts: one in Thornbury Township, zoned B Business; and two in Birmingham Township, zoned with commercial classification. To the east, the Property adjoins Penn Oaks Country Club which is zoned A Agricultural Residential and is currently used as a golf course. To the south, the Property is bounded by Dilworthtown Road and is across

the street from three parcels containing three different zoning categories. To the west the Property is bounded in Birmingham Township by Route 202.

18. The highest elevation of the Property is at the northwest corner along Route 202, and the lowest point is in the middle of the east Property line where the Property adjoins the Penn Oaks Country Club, which point is 60 feet below the highest elevation.

19. The Property currently contains a farm complex which is located largely with in Birmingham Township and consists of three houses, two barns, a garden area, two garages, a shed and a pump house, all of which features will be removed in connection with the proposed development.

20. The site plan marked Exhibit A-1 demonstrates the points of vehicular access to the Property. The Property will be accessed through Birmingham Township, with a right-turn in/right-turn out drive 500 feet north of the intersection of Route 202 and Dilworthtown Road. In addition, there will be two entrances in the Township located on Dilworthtown Road, one 300 feet from Route 202, and the second 300 feet further to the east of Route 202.

21. Signs are proposed in accordance with the renderings appearing in Exhibit A-2. There will be one pylon sign in Thornbury Township along Dilworthtown Road and one the larger pylon sign along Route 202 in Birmingham Township. In addition, the Applicant proposes building signs and under-canopy signs as illustrated in exhibits presented to the Board.

22. The Applicant proposes 773 parking spaces at an overall ratio of 6.35 per 1,000 square feet of retail area. In Thornbury Township there will be 551 parking spaces, and in Birmingham Township there will be 221 parking spaces, which will provide ratios of 5.3 and 12.2 spaces per 1,000 feet of retail area respectively. In Thornbury Township the 5.3 per 1,000-square foot ratio is the same as the Longwood Village project which was constructed in East Marlborough Township by R.J. Waters & Associates, Inc.

23. The Applicant and Penn Oaks Estates, Inc. have reached an agreement as to the improvements to be constructed along the east property line of the Property which will include a berm between the golf course and the subject Property, containing trees, a fence and a retaining wall. They propose a 30-foot undisturbed strip along the easterly property line bounded on the east by the Penn Oaks Country Club.

24. The Township Planning Commission has recommended that there be a 30-foot right-of-way at the rear (east) of the Property to connect this site and Dilworthtown Road with the properties to the north. The owners of the Penn Oaks property have expressed their objection to that concept, feeling that there will be a negative impact on the Property by the construction of a roadway along the easterly boundary of the Property.

25. As an alternative, the Applicant has proposed a 30-foot easement, as shown in Exhibit A-7, a plan by Chester Valley Engineers, entitled "Alternate Access Easement Plan" which will connect the proposed parking area of the Property with the Stoltzfus property to the north at a location approximately 200 feet from the rear line of the Stoltzfus property.

26. The Chester County Planning Commission has offered comment on the proposed plan and zoning change in a letter dated August 4, 1998 which was supplied to the Township. This letter, as agreed by counsel for the parties, will be made part of the record and has been marked Exhibit B-9.

27. The Applicant has presented a proposed landscaping plan (Exhibit A-10) which is a "typical" plan without particular plant types designated.

28. R. Douglas Stewart, the planning consultant for the Applicant, testified to the justification for the proposed zoning change of the Property to the B Business District classification which, as set forth in Exhibit A-2, he justifies based upon the location of the Property by two major roads and the ease of access to the Property, as well as the numerous commercial and highway-orientated zoning designations which surround the Property in both Birmingham and Thornbury Townships.

29. Mr. Stewart points out that the Property is already influenced by the heavy traffic on the highway system and the high intensity uses which are nearby and offered the opinion that, from a planning viewpoint, a less intense use than the neighborhood shopping center would be inappropriate at this location.

30. The Applicant has also performed an impact analysis for the Property, which is included in Exhibit A-2, in which in concludes that the Property can be adequately serviced by Philadelphia Suburban Water Company, West Chester Fire Department and one of three sewage treatment alternatives presented in the study by R.E. Coleman & Associates.

31. In terms of impact of this project on the historic resources, the Applicant testified that the existing structures on the Property cannot be saved, but that the Faucett tract ranks low in terms of its candidacy for an open space site in Thornbury Township. The impact analysis also concludes that the Dallett tract, located in the eastern part of the Township, has a high value and is a very viable candidate for acquisition as open space.

32. The Applicant has offered, in lieu of saving the existing structures on the Property, and in the interest of assisting the Township in its open space acquisition efforts, to make a contribution to the Township should its zoning and land development proposals be approved, in order to assist it in the acquisition of additional Township open space.

33. The Applicant has also considered the traffic impacts of this proposal and has presented a traffic impact study by Traffic Planning & Design, Inc. which is part of the Exhibit A-2. The surrounding roadway improvements to Route 202, Dilworthtown Road and Brinton's Bridge Road are depicted on a plan providing by Traffic Planning & Design marked Exhibit A-13.

34. The traffic study presented by the Applicant concludes that with the development of the site as proposed, including the recommended roadway improvements, the Route 202/Dilworthtown Road/Brinton's Bridge Road intersection will be significantly improved for the critical weekday p.m. peak hour relative to base conditions without the proposed development. The roadway improvements on Dilworthtown Road have been designed to maximize the stacking capacities for the various left-turn lanes shown on Exhibit A-13.

35. The Applicant presented testimony and a preliminary stormwater management analysis as part of Exhibit A-3, which indicates that the proposed stormwater conveyance system will consist of grass-lined swales, inlets and metal storm pipes and that stormwater runoff generated from the impervious surfaces will be collected and conveyed into one of possibly three stormwater detention facilities. The narrative indicates that the proposed storm sewer conveyance system and management facilities will be designed and detailed during the preparation of the land development plans for the project in accordance with the subdivision and land development ordinance of the Township and of Birmingham Township.

36. Following the hearing, counsel for Penn Oaks Estates, Inc. presented to the Board a stipulation dated July 10, 1998 between the Applicant and Penn Oaks Estates (hereinafter "Stipulation") by which they reached an accommodation concerning measures to be taken by the Applicant to alleviate potential off-site adverse impact of the proposed rezoning and development. That Stipulation has been made part of this record as Exhibit B-10.

Discussion

This application is unusual in the respect that it is an application for conditional use approval of a use which is not authorized for the land upon which it is proposed to be constructed. As indicated in the foregoing Findings of Fact, the Applicant has submitted this application and concurrently has submitted an application for a Zoning Ordinance and Map amendment which the Board advertised and has considered simultaneously with this application. Essentially, therefore, the Board is considering this

conditional use application, having created the fiction of the Property being presently zoned to permit the proposed shopping center use. Of course, any action that we take in the approval of the conditional use application will be contingent upon the Board having duly adopted a Zoning Ordinance and Map amendment which permits the shopping center development over 30,000 square feet in area by conditional use, as set forth in the proposed ordinance (Exhibit B-4). As we indicated at the outset of the conditional use hearing, we have stricken the proposed amendment to the extent it includes the 80,000-square foot neighboring property of Penn Oaks Estates, Inc., as set forth in the amendment to application submitted by the Applicant and Penn Oaks Estates, Inc. (Exhibit B-3). We do not in any respect consider the adjacent property of Penn Oaks Estates, Inc. to be an appropriate candidate for rezoning in conjunction with our review of the application of Birmingham Devco, or otherwise.

Since favorable action by this Board on the conditional use application which is before it is dependent upon our rezoning of the Property, we want first to address some of the issues which bear upon that decision. We agree with the Applicant's assessment of the zoning change justification, as set forth in Exhibit A-2, in that from a land planning viewpoint the Property appears to be ideally located for a commercial use designation. As indicated in the testimony, there are several intensive highway oriented uses in the immediate vicinity of this Property, both in Thornbury and Birmingham Townships. The Property has frontage on Route 202, and the potential exists for appropriate highway modifications to make this site easily accessible to a large population. There is an appropriate buffer in the form of a golf course between the Property

and the residential development of Thornbury Township to the east. Thornbury Township has very limited commercial area, the only other locations being the Stoltzfus property to the north and the properties at the southwest and southeast corners of the intersection of Routes 926 and 202. We believe that there is a need for additional commercial development in Thornbury Township and feel strongly that any expansion of the B Business District at the intersection of Routes 202 and 926 to accommodate a center of this size is inappropriate, given the already overburdened road system at that intersection and the commercial development immediately to the north of Route 926 in Westtown Township.

In reaching this conclusion, we are cognizant of the comments of the Chester County Planning Commission as set forth in the review letter (Exhibit B-9) from William H. Fulton, Secretary of the Planning Commission. The Planning Commission has recommended that the Zoning Ordinance and Map changes not be approved, because they are inconsistent with the land use policies adopted in the Township comprehensive plan and because of the significant effects that the proposed use would have on the local road network. The Commission's principal objection appears to be an inconsistency between this proposal and the comprehensive plan which discusses the "two poles" of the Township (Cheyney University and the area west of Route 202) as development district with the center of the Township being maintained as relatively undeveloped and open space area. The Planning Commission does find that the proposed use is consistent with the recommended use for the Suburban Landscape, as set forth in the Chester County Comprehensive Plan, *Landscapes*, which designates the area of the proposed Zoning Map change as a

"Suburban Landscape." The letter indicates that the Suburban Landscape designation includes areas where infrastructure and public services have been or should be, extended to accommodate residential development and *shopping* and employment centers (emphasis supplied). It is peculiar that the County would take a position which is inconsistent with its own carefully crafted Comprehensive Plan. Our view of the Planning Commission's objection is that it is preferable to provide commercial development along the Route 202 Corridor than to introduce it to an area near Cheyney University. The subject Property which is now under consideration for the zoning change is as close to the western part of the Township as one can find, with the exception of the Exxon Station and the Robinson Tract PRD on the west side of Route 202 at the intersection with Route 926. In this respect, we do not believe that this proposal is at odds with the Township comprehensive plan.

The other basis for the negative recommendation of the County Planning Commission is the effect that this proposed use would have on the local road network. In our judgment, the location of commercial development at this site has a much greater potential for preserving the existing road network of Thornbury Township than if it were located in another area of the Township. Route 202 is slated for improvements, and the developer, as indicates at the hearing, proposes major improvements to the intersection and to Dilworthtown Road. We believe that adequate accommodation can be made to deal with the traffic generated from this site and that there is no better place in the Township for commercial development than on properties adjoining Route 202.

Having indicated our general willingness to consider the requested rezoning, we will now address how this application meets the standards of the proposed ordinance and the other standards of our Zoning Ordinance relating to conditional use applications. § 155-82.1. of the Zoning Ordinance deals with conditional uses. We find that, in accordance with the statement of intent set forth in § 155-82.1.A. of the Zoning Ordinance, the proposed use for the Property constitutes a major use, having the potential for substantial impact upon the community, and is one appropriate for the conditional use process. The application submitted by the Applicant is comprehensive, and we find that it is in substantial compliance with the requirements for the submission and content of conditional use applications set forth in § 155-82.1.B. Under this section, it is the burden of the Applicant to demonstrate compliance with the standards for conditional use contained in § 155-82.1. and to indicate the means by which the potential impacts of the proposed shopping center development will be mitigated. We find that the Applicant has satisfactorily carried that burden.

The application has been reviewed in accordance with the review procedures set forth in §155-82.1.C. In particular, the application was reviewed by the Zoning Officer, the Supervisors held a hearing within 60 days, and we have received comment from the Planning Commission for consideration at the hearing. A stenographic record of the hearing proceedings was made. The Board has received comments from the Township Planning Commission which recommends the rezoning of the Property and the approval of the application, subject to conditions which we have incorporated substantially in the order which follows. §155-82.1.C.(7) of the Zoning Ordinance allows the Board,

at its sole discretion, to attach such conditions to its approval as it deems necessary to further the purposes of the Zoning Ordinance. This application has given rise to the need of the Board to impose multiple conditions of approval which we believe are warranted to mitigate the potential off-site impacts of this development.

The project under consideration is somewhat unique because it lies within two townships and requires the coordination of both this Township and Birmingham Township. Accordingly, our approval will be conditioned upon our being assured that the portion of the development project in Birmingham Township will be developed in a manner which is acceptable to the Township and which is compatible with the use and development proposals which have been presented to us. While the exhibits presented to the Board show what is intended for Birmingham Township, we are not assured that is what will be ultimately approved by Birmingham Township.

The Board will require that the Applicant provide a means of connecting the Property to the Stoltzfus property to the north by means of a service road of such width and at such location as is determined by the Board to provide the ultimate connection of the Property to Country Club Road. The Applicant has shown proposed traffic improvements which appear preliminarily to address satisfactorily the need to accommodate the traffic impacts to be created by the project, but the Board will condition its approval on the Applicant's agreement to construct such road improvements as are necessary to mitigate the impact of the development in the Township's opinion, based upon recommendations of its traffic consultant.

While stormwater management and sewage treatment proposals have been preliminarily presented in the conditional use hearing process, the feasibility of such proposals will be ultimately determined by the Township Engineer, and our approval will be conditioned accordingly.

The proposed project, while abutting a golf course project to the east, should, nevertheless, be screened appropriately. We will impose requirements necessary to mitigate that impact. The application included a rudimentary landscaping plan, but our conditions will require a more thorough proposal which will be subject to the approval of the Board and its landscape consultant.

We are cognizant that the rezoning of the Property and the approval of the proposed development project will have a substantial impact upon the existing open space. Almost 20 acres of the total Property being developed is in Thornbury Township, and it wi'l be hereafter lost to the Township as potentially available for open space purposes. The Board is extremely pleased with the Applicant's willingness to recognize the impact of this project upon the Township open space and welcomes its acknowledgment, as set forth in Kevin Lahn's testimony (N.T. 16) and in the impact analysis contained in Exhibit A-2, that another property in the Township, which is currently owned by the Dallett family, has a high value for preservation as open space, making it a very viable candidate for acquisition by the Township. The Applicant has offered, in lieu of saving the existing structures and open space on the Faucett property, to assist the Township financially in obtaining the balance of the Dallett property should it receive the approvals which it now seeks. The Board has invested a considerable amount of time, effort and public funds in the acquisition of a portion of the Dallett tract, and will

welcome the assistance of the Applicant in completing its open space acquisition program on the Dallett tract. We believe that this acquisition will more than off-set the loss of open space and historical amenities on the Property and will provide a significant piece of open space which can be enjoyed by Township residents for generations to come.

The introduction of a commercial project of this magnitude and this impact in Thornbury Township is unprecedented, but we feel that with appropriate safeguards and conditions, it will be an asset to the Township and its citizens. We are heartened by the involvement of R.J. Waters & Associates, Inc. in the development of this project. The Board is familiar with the work of this company, most notably the Longwood Village Center in East Marlborough Township, Chester County, we are impressed with the knowledge and experience that R.J. Waters brings to the development of this up-scale neighborhood shopping center. We have a high level of confidence that the project will be successful.

In addition to the other provisions of §155-82.1., we have reviewed this application under the general standards for conditional use approval contained in §155-82.1.D., and we find that, appropriately conditioned, this project is in compliance with the standards therein set forth, and we will, accordingly, approve the application.

Conclusions of Law

1. The hearing was duly advertised, all required notices were given, and the hearing was duly convened.

2. The Board of Supervisors of Thornbury Township has jurisdiction of this application.

3. The Applicant has demonstrated that the proposed shopping center development meets the specific standards for the B Business District, as amended in the manner proposed by the Applicant.

4. The Applicant has demonstrated compliance with all of the relevant standards and requirements for the review of conditional use applications, as set forth in § 155-82.1.

5. The approval of this project will be conditioned as a matter of law upon the Board's final approval of Zoning Ordinance and Map amendments which will zone the Property in the B Business District classification, as amended appropriately to accommodate a shopping center development aggregating over 30,000 square feet or more of gross floor area, with appropriate other associated modifications of the existing B Business District regulations.

The Board, therefore, enters the following order:

ORDER

AND NOW, this 3rd day of November, 1998, upon consideration of the application of Birmingham Devco for conditional use approval to permit the development of the Property as a neighborhood shopping center as a conditional use authorized by the provisions of §155-35 of the Zoning Ordinance, as the same is proposed to be amended, and having found that the Applicant has demonstrated compliance with the standards of the Zoning Ordinance relating to the use as proposed and has satisfied the requirements of §155-82.1. of the Zoning Ordinance relating to conditional use applications, IT IS HEREBY

ORDERED that the conditional use application is granted to permit the proposed shopping center project, subject to the following express conditions:

General

1. The proposed use and construction of the shopping center improvements on the Property by the Applicant shall be substantially in accordance with the testimony and exhibits presented to the Board by the Applicant, except to the extent that the Applicant's testimony and exhibits are modified by the remaining conditions of this order and/or the subsequent determination of the Board in the land development review process of this application.

2. This approval shall not be construed to be a waiver of any other provision of the Thornbury Township Zoning Ordinance, Subdivision and Land Development Ordinance, Comprehensive Plan or any other Township or other governmental ordinance, law or requirement, it being the intention of the Board that the proposed use of the Property and the construction thereon shall comply with all applicable ordinances, laws and requirements, except to the extent modified by this order.

3. This approval shall not be effective until and unless the Board of Supervisors of Thornbury Township duly enacts the Zoning Ordinance and Map amendments by which the neighborhood shopping center use shall be permitted at the Property.

4. The Applicant's entitlement to develop the Property pursuant to this approval shall be conditioned upon the Board's satisfaction that the portion of the Property located in Birmingham Township is being developed

pursuant to complementary plans which have been duly approved by the Birmingham Township Board of Supervisors, and in a manner which is substantially consistent with the Applicant's plans and the testimony and exhibits presented to the Board and acceptable in all respects to the Board.

5. If the development of the shopping center is to be carried out in progressive stages, each stage shall be so planned and developed that all the requirements of this conditional use approval, the final land development plan approval and all other applicable Township ordinances shall be met at the completion of each stage.

6. The Township shall not be bound, and this order shall not be changed by any agreements between the parties to the hearing, including the agreement contained in the Stipulation marked as Exhibit B-10, except when and to the extent the Board may hereafter approve such agreements.

7. Alcoholic beverages shall not be made available for consumption on the site, except in conjunction with a full-service family-type restaurant.

Stormwater Management

8. All surface and subsurface water systems shall be constructed as to control water amounts in a 100-year storm and shall be subject to regularly scheduled monitoring to ensure that safe and clean water enters the ground. All stormwater management measures shall comply with the stormwater management provisions in §115-48 and 49 of the Thornbury Township Subdivision and Land Development Ordinance.

9. The stormwater management ponds on the Property shall be designed in a manner that provides for a naturalized appearance in a free-flowing shape and planted with native plantings suitable for wetlands. The final location, size shape and plantings shall be subject to the approval of the Township Engineer and landscaping consultant.

10. All stormwater shall be contained on the tract and directed to a natural drainage channel or storm sewer system and controlled at, on and beyond the point of discharge in a manner approved by the Township Engineer. The water quality of all runoff shall be assured by the installation of appropriated facilities approved by the Township Engineer to help remove heavy particles, oil/grease and other contaminants and floating substances which pollute the runoff. The Applicant shall annually test the stormwater runoff from the Property for hazardous waste/pollutants. The method of the testing shall be approved by the Township Engineer, who shall be supplied a copy of the test results. The Applicant shall implement all reasonable corrective measures recommended by the Township Engineer if hazardous waste/pollutants from non-natural sources originating on the Property of unacceptable levels are found.

Right-of-Way

11. A 30-foot wide right-of-way shall be designated on the land development plans and offered for dedication to the Township, allowing connection between the adjoining property to the north (currently the Stoltzfus property) and Dilworthtown Road. The location of the right-of-way shall be determined by the Board of Supervisors at the

time of final land development approval and shall be located in accordance with and to accomplish the purposes of the Official Township Map.

Screening

12. All land development of the Property shall be fully screened from view along its easterly border and all abutting residential uses. The screen shall be a completely planted visual barrier landscape screen composed of native evergreen and deciduous trees and shrubs. Tree specimens shall be no less than 8 feet in height, shrubs no less than 3 feet in height (spaced at intervals of not more than 5 feet). The screening shall be planted in offset rows to produce an effective and attractive barrier. All plantings and the layout of the screen shall be approved by the Township planning/landscaping consultant. The Applicant shall maintain the screen plantings and replace any plant material which does not live.

13. All heating, ventilation and air conditioning systems shall be totally screened to hide them from view and to mitigate noise by the installation of parapet walls on top of the building and/or such other measures as may be approved by the Board.

Landscaping

14. The development shall be fully landscaped with the following specific provisions:

a. All pedestrian and vehicular traffic corners shall have clear sight distance.

b. The parking area shall provide for islands with trees and other appropriate plantings. The islands

shall occur at the rate of 1 island per 12 continuous parking spaces and shall be of the design and location as determined by the Board during final plan review.

c. The pedestrian sidewalk along the storefronts shall provide for landscaping in order to mitigate the mass of the buildings' size and provide for more pervious surface without obstructing safety considerations.

d. It is not intended that this approval be construed to be the Board's agreement to the design elements of the site improvements, which need refinement and improvement. The design shall he improved during the land development review phase. For example, but not by way of limitation, the Applicant shall present to the Board at that time a revised facade and sidewalk plan which shall incorporate an outdoor public seating and gathering area which shall include landscape planters, tables, umbrellas and special lighting fixture treatments. The Applicant shall also submit a proposal which incorporates additional roof breaks and recesses in the facade to break up the long length of the center.

e. All landscape design and materials shall be subject to the approval of the Township Engineer and the Township planning/landscaping consultant. The landowner shall maintain all plantings and replace any plant material which does not live.

Parking and Vehicular Circulation

15. The driveway in front (immediately to the west) of the buildings shall be a minimum width of 30 feet in order to provide for an emergency fire lane. The fire lane shall be designated by a 12-foot wide striped area with

appropriate signage. All fire and emergency access shall be subject to the approval of the Township Engineer and the Township fire marshal.

16. All interior circulation shall be designed to minimize the interaction of customer vehicles and delivery trucks. All tractor trailer deliveries shall be made to the rear of each retail use.

17. The parking lot shall be configured to provide a maximum number of parking spaces directly in front of the supermarket and provide for appropriate shopping cart drop-offs, substantially in accordance with the plans and exhibits submitted at the hearings on the application.

18. The number of total parking spaces, the layout, material and grading of all parking, vehicular access and interior circulation shall be substantially in accordance with the plans and exhibits submitted at the hearings and shall be subject to the approval of the Board.

Outdoor Storage

19. All dumpsters shall be located to the rear of the buildings, be screened and enclosed by gated, 6-foot high finished concrete block walls and landscaped appropriately.

20. No other temporary or permanent outdoor storage facilities shall be permitted on the site after construction is completed.

Lighting

21. All lighting shall be non-glare, not directed off the site. Lighting layout, design type and height shall be subject to the approval of the Board.

Signs

22. All under-canopy signs located on the exterior of the building shall be placed perpendicular to the buildings' facades and free-standing pylon signs shall meet the requirements of the Township sign ordinance.

Open Space and Historic Preservation

23. In lieu of providing open space on the Property and preserving the existing structures on the Faucett tract, the Applicant shall contribute the sum of $600,000 to Thornbury Township for the express purpose of purchasing additional open space at the Dallett property. This contribution shall be paid one-third (⅓) at the time of building permit issuance and the remaining two-thirds (⅔) at the time of initial occupancy of the center. In the event the Township does not use this fund for the designated purpose, or such other historic/open space purpose within the Township as the Township may select, within ten (10) years of the date of final land development plan approval, the Township shall refund the unused portion thereof to the Applicant.

24. Prior to the removal from the Property, the historic structures located in Birmingham Township shall be documented by the Applicant through archival architectural photographs and plans recording the basic dimensions of the structures, which documentation shall be filed with the appropriate Township and County historical bodies.

THORNBURY TOWNSHIP
BOARD OF SUPERVISORS

/s/ Charles Wilson
Charles A. Wilson, Chairman

/s/ J. Christopher Lang
J. Christopher Lang

/s/ William A. Schmidt, Jr.
William A. Schmidt, Jr.

/s/ Patricia A. Dewey
Patricia A. Dewey

Robert MacDonnell

EXHIBIT 13

IN THE UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF PENNSYLVANIA

* * *

IN THE MATTER OF: THORNBURY NOBLE, LTD.,	)	
Plaintiff,	)	
-v-	)	No. 99-CV-6460
THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and CHRISTOPHER LANG, ANDREW SCHMIDT, PATRICIA DEWEY, CHARLES WILSON, and ROBERT MacDONNELL,	)	
Defendants.	)	

* * *

Friday, October 26, 2001
West Chester, Pennsylvania

* * *

Continued oral deposition of KEVIN A. LAHN, taken in the law offices of MacElree, Harvey, 17 West Miner Street, West Chester, Pennsylvania, on the above date, commencing at 3:05 p.m., before Arlene M. LaRosa, Registered Professional Reporter.

* * *

[32] you mean a hearing?

A. Conditional use hearing or regular board of supervisors meeting. I remember it was at a public meeting. That's all I recall.

Q. Do you recall who on the board was speaking about the timing of the contribution?

A. No, I don't.

Q. Was it important for R.J. Waters to have the timing of the contribution one-third at the building permit issuance and two-thirds at the time of the initial occupancy?

A. Yeah. It is to our benefit because we are not paying interest on that money until the shopping center opens and the rent would start coming in. But we have negotiated things like this before or agreed with other townships on payments of contributions in other townships for other projects.

Q. Was it your understanding that this 600,000 contribution was contingent upon getting your land development approvals?

MR. BELLWOAR: Objection.

A. We would never agree to any conditions in a conditional use approval unless we had approval. I mean, you can't finance an impact fee [33] without having land development approval. You can't put in road improvements without have [sic] land development approval.

Q. Did you consider this to be an impact fee, this 600,000?

A. It is the normal way of business in Pennsylvania as far as, you know, based on my experience working here for 15 years.

Q. Are you aware of whether Thornbury Township had any impact fee ordinances in place at the time in 1998?

A. I was not aware.

Q. Has Waters made contributions in other townships for open space when you were trying to get a piece of property rezoned?

MR. RILEY: Objection.

A. Either open space or monetary contribution, yes. For the most part, our other projects have already been zoned, but I am involved with a project now on a rezoning and we have offered to make a contribution for traffic improvements.

Q. Where is that at?

A. It is in Lancaster County.

Q. The 23 continues: In the event the

* * *

EXHIBIT 14

FACSIMILE COVER PAGE

To:	Mahlon Rossiter	**From:**	Chuck Wilson
Sent:	3/24/98 at 8:59:22 AM	**Pages:**	1 (including cover)
Subject:	Info Update		

Original to Bob Adams:

Bob,

I had a meeting on Friday with Kevin Lahn of R.J. Waters and two laccabuccis (sp?). The purpose of the meeting was to address the impact of the proposed shopping center at route 202 and Dilworthtown Road on the Golf Club

The two parties seem to be trying to work together as well as get more out of the opportunity. They showed a plan involving an internal road coming from Penn Oaks to the shopping center (Birmbury, I didn't get a vote) which would also have an additional forty townhouses along the road north of the shopping center and between the golf course and the Birmingham commercial strip along route 202. The idea would result in the internal road, which seems good, and the additional townshouses, which is okay as it does further enhance the golf course. There are of course a lot of issues: 1) what zoning needs to be changed to allow for each aspect of the project (we may have rezoned the property behind Wenner Ford to commercial at the same time we did the Stolfus property); 2) can the lot requirements be met by the townhouses [sic] and the shopping center, and; 3) can the sewerage and other infrastructure requirements be met, including open space.

I suggested the principals have their respective attorneys, Randy Schauer and Froen Crawford contact you to determine the zoning abed [sic] and sub-division requirements.

One key issue is not having this slow down the Waters' project since we want them to be able to lay the first brick to assure their supermarket will be the next one built to enable our funding for the next phase of the Dallett tract acquisition effort.

I will not votew [sic] for any additional commercial property at routes 926 and 202 so the Acchiavatti's are not likely to get Genuardi as a lead tenant. I still must communicate my conclusion to Acchiavatti. I have informed Skip Genuardi that if they wanted to build a smaller market which would fit on the land they might be able to get support, if it wasn't something allowed by right. He said he would look into it, but I haven't yet heard from him.

There is also a potential buyer pursuing the Commons at Thornbury parcel. This buyer is interested in essentially building the presently approved plan. His price seems to be getting closer to something which should be acceptable to the Acchiavattis. I fear they are too unreasonable.

Please call if you have any questions.

Chuck

cc: Mahlon Rossiter

EXHIBIT 17

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD. Plaintiff v. THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the Members of the Board of Supervision in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A. W. WILSON, and ROBERT A. MacDONNELL, Defendants	* * * * * * * * * * * * * * * * * * * *	Civil Action No. 99-CV-6460 JURY TRIAL DEMANDED

* * * * * * * * *

DEPOSITION OF RICHARD DUGAN

The Deposition of Richard Dugan, taken in the above-captioned case on Tuesday, August 28, 2001, commencing at 11:00 a.m., in the Offices of Giant Foods, 6300 Sheriff Road, Landover, Maryland, 20785, and was reported by Dawn M. Hyde, a Notary Public.

* * *

[13] this deal?

A. Absolutely.

Q. Did you have an understanding about what the Acciavattis and Thornbury Noble intended to do at the site of the Commons at Thornbury?

A. We had worked out a site plan between us. What we needed for them to do to be able for us to build a store.

Q. And what was that, that Genuardi's needed to have done for that site?

A. There were access issues. We needed certain access points. We needed a certain parking ratio. And not only the ratio, but where the parking was located on the site. You can get a parking ratio by putting parking spaces behind a store, which doesn't work. And the placement of the store and how that related to the access points.

Q. Did you understand that Thornbury Noble was intending to request that there be some rezoning of that property?

A. Yes. A portion of the property. My understanding was the front portion was zoned. The rear portion, which we needed to be able to put the store on, was not zoned.

Q. So is it fair to say that Thornbury Noble [14] and Genuardi's discussed the moving back of the store onto that portion that was going to be rezoned?

A. Yes. That was a requirement of Genuardi's, that we could not fit on the zoned portion alone. We needed the rear portion to be rezoned to actually place the store there.

Q. When you say it was a requirement that that property be rezoned, was that to address the issues that you were talking about in terms of the access in and out of the site?

A. It was not only access, it was parking as well. And I believe it's covered in the deal letter or the Letter of Intent under Site Plan, item number XV.

Q. And I'll just paraphrase, but that's that the lessee and lessor will attempt a zoning and plan change to locate the building at the Berdich property line within twelve months.

From that, it says that Genuardi's agreed to share the legal and engineering expenses for that project.

A. I believe that's what we were referring to at the time.

Q. Following the signing of the Letter of

* * *

[32] No. 7 was marked for identification.)

MR. STYER: Andy, it's a letter dated July 22, 1998 from Rich Dugan to Alan Baumholtz.

MR. BELLWOAR: Thank you.

Q. Could you tell me what this letter is?

A. It's a letter withdrawing our interest to proceed further with the Thornbury Noble organization to pursue building a store at this site.

Q. Why did Genuardi's withdraw its Letter of Interest to pursue the site at Thornbury Noble?

A. Two reasons. After the meeting of July 7, we had – or I had conversations, as well as others, with the officials of Thornbury and were told that the chance of this getting rezoned or the property we needed rezoned were

pretty slim. And at the same time the opportunity to build a store down at the Waters piece, which was referenced earlier, was presented to us. And the decision was made since that didn't look like the Acciavattis were going to get the rezoning they needed, we would move to the second location.

Q. Which was Genuardi's first choice here as far as locations were concerned?

A. Genuardi's first choice always was the 926 [33] and 202. Even after negotiating with Waters, they realized that this was a B location. The A location was the Thornbury Noble piece.

Q. And why was that?

A. Just because it was on two major intersections. Whereas Dilworthtown Road was not a major road. 202 was, but the access into the project at the Waters piece wasn't – it just wasn't a better location from a real estate point of view.

When you have two major roads coming together and you can be at that intersection that is the ground zero piece.

Q. Now, you referenced that you had some discussions with people from the Township.

A. Yes.

Q. Who initiated those discussions?

A. I don't recall if I called or one of the Township people called. I just don't recall if it was me or them.

Q. Let me show you what we'll mark as Dugan No. 8.

(Whereupon, Dugan Deposition Exhibit No. 8 was marked for identification.)

MR. STYER: Andy, that's the memo from Mahlon Rossiter to the Board of Supervisors, dated

* * *

[35] conversations prior to the letter of July 22 to Thornbury Noble discussing the possibility of the rezoning. But it would be out of character for me to call anybody to say this is – to announce Genuardi's intentions of what they're going to do. If the question was asked, you know, we may discuss it, but that's just out of character.

Q. Do you recall whether Mr. MacDonnell told you that Thornbury Noble was not going to get the rezoning?

A. I recall having conversations with Mr. MacDonnell, and it's my belief that it was Mr. Macdonnell that – because he was the person that I talked to the most, that he was the one that advised me that it didn't look favorable for the Thornbury Noble to be granted that zoning. And that obviously triggered in our decision not to keep pursuing it.

Q. Did Mr. MacDonnell tell you about the Waters tract?

MR. GONZALES: Objection.

You can answer.

A. No. I don't think he told me about it. We were aware of it long before my discussions with him. You know, we had the opportunity earlier than

* * *

[84] of 1998, correct?

A. Correct.

Q. And that's when you first learned about the Waters project.

A. Correct.

Q. So the next question is, when did Genuardi's – how did you learn about the Waters tract first?

A. We were contacted by the Waters people.

Q. Did Genuardi's enter into any discussions with the Waters people in the spring of 1998 about putting a Genuardi's down there?

A. Yes.

Q. And how far did those discussions proceed in the spring of 1998?

A. I'm not sure how to answer your question. We had discussed the possibility of them building a shopping center there. They were looking for a food store to anchor the shopping center and would we be interested.

Q. And what was Genuardi's response?

A. Initially, we were happy with the site up on 926 and 202. It was a better location and that was it.

Q. When was the next contact you had with

* * *

[88] contacted by Waters?

A. I don't recall a date. It would have been before the July meeting, because they were – had suggested I look at that piece that Waters was developing.

Q. Who suggested you look at the Waters piece?

A. It would have had to have been MacDonnell, because he was the person I was talking to at the Township.

Q. And did he say anything, other than you should look at the Waters piece? What did he say about it?

A. I don't recall exactly. I remember the discussion – he was aware that there was a development going on there. Much more than that I don't recall.

Q. Do you know whether or not Genuardi's – in any of the plans that Genuardi's was considering to put a Genuardi's supermarket at Thornbury Noble – did any of those plans involve placing a drug store on the site?

A. Yes, I believe so.

Q. Do you recall the name of the drug – had it proceeded to a point where there was a drug store

* * *

[98] that there's still a possibility that if Mr. Baumholtz could persuade the Township to rezone, that Genuardi's would still consider the 926 location, or was it just we've made the decision, we're going south?

A. Let me say that the 926 and the 202 intersection was always our first choice. I think the discussion with Mr. Baumholtz was based on our discussion with the

Township, that despite the best efforts that you have, they're just not going to approve the rezoning. And that in order for us to not be out positioned by a competitor, we needed to move forward with the Dilworthtown piece.

Q. I'm sorry if I'm repeating myself, but did Mr. MacDonnell ever tell you why the Board felt the way it did about rezoning?

A. I don't know. I don't recall if he specifically got into specifics. They were not happy with the performance of the Acciavatti family in living up to the things that they said they would do. Not that they hadn't done them, but that they hadn't done them timely, and that's just in general reference, not specific.

Q. Did you ever have any conversations with Skip Genuardi about the telephone call you had with

* * *

EXHIBIT 20

[SEAL] **THE COUNTY OF CHESTER** [SEAL]
[Names Omitted In Printing]

November 23, 1998

Constance Dulin, Secretary
Thornbury Township
8 Township Drive
Cheyney, PA 19319-1019

Re: Application for Amended Final Plan Approval, (or Proposed in the Alternative by the Applicant) a Zoning Map Amendment

\# 2606 – Thornbury Township

Dear Ms. Dulin:

The Chester County Planning Commission has reviewed the proposed final plan amendment/zoning ordinance amendment as submitted pursuant to the provisions of the Pennsylvania Municipalities Planning Code, Section 502 (b) and 609(e). We received this referral for review from you on October 19, 1998. We offer the following comments to assist in your review of the proposal:

DESCRIPTION OF THE AMENDMENT:

1. The applicant had received final land development plan approval in 1995 for a 50,000 square foot food market on a site at the intersection of Routes 202 and 926. The food market has not yet been constructed, and the applicant has now proposed shifting the location of the food market within the site in order to achieve a better circulation layout. The applicant has therefore has prepared an application that requests a revision to the approved final plan to allow the relocation, or in the

alternative, a rezoning of approximately two acres from the A-Agricultural/Residential District to the B-Business District.

COMMENT ON THE PROPOSED ZONING MAP AMENDMENT:

2. It appears that the Agricultural/Residential District does not allow land uses such as the proposed food store. The amendment to the final plan to allow the land use would not be supported by the zoning ordinance. Therefore, the rezoning to the Business District would appear to be a prerequisite to allow the relocation of the food store and the revision to the approved final plan.

   The current Township Comprehensive Plan does not contain a future land use map or specific recommendations regarding this site, although the zoning map has been designated as representing the Township's future land use goals. General policy statements in the Comprehensive Plan support the location of commercial land uses where they can be adequately served by road facilities and utilities.

COMMENT ON THE PROPOSED REVISION TO THE LAND DEVELOPMENT PLAN:

3. The elevation changes between the retail site and the areas to the south, and the use of a retaining wall, may result in potentially adverse visual effects on the residential areas to the south and east of the site. If the Board of Supervisors agrees to allow the food store to relocate farther to the east, additional landscaping should be required to protect the residential areas to the south and east. This will also help to reduce potential land use conflicts between the retail

and residential land uses in this area. Special caution should also be taken with exterior lighting, to limit light trespass onto adjacent residential areas.

LANDSCAPES:

4. The County Comprehensive Plan document, *Landscapes*, places this area within a Suburban Landscape, and the food store is consistent with this designation.

RECOMMENDATION: The Board of Supervisors should rezone the site to the Business District. The applicant should revise the final land development plan, and the Township should require additional landscaping as suggested in this letter.

If the Board of Supervisors amends the zoning map as requested, we request an official copy of the action be sent to the County Planning Commission as required by Section 609(g) of the Pennsylvania Municipalities Planning Code. This will allow us to maintain a current file copy of your ordinance.

Sincerely,

/s/ William H. Fulton
William H. Fulton, AICP
Secretary

WHF/WSB/kp
cc: Charles Wilson, Board of Supervisors Chairman
Ronald Miller, Planning Commission Chairman

EXHIBIT 27

[SEAL] **THE COUNTY OF CHESTER** [LOGO]

[Names Omitted In Printing]

August 4, 1998

Mahlon Rossiter, Manager
Thornbury Township
8 Township Drive
Cheyney, PA 19319

Re: Proposed Zoning Map and Ordinance Amendment – Two Parcels from "A" Agricultural Residential to "B" Business District Shopping Center Standards

\# 2546-A – Thornbury Township

Dear Mr. Rossiter:

The Chester County Planning Commission has reviewed the proposed amendment as submitted pursuant to the provisions of the Pennsylvania Municipalities Planning Code, Section 609(e). The original referral for review was received by this office on June 11, 1998 from Robert F. Adams, Township Solicitor. Upon initial review, we noted that the amendment referred to a recodified zoning ordinance. We received a copy of the recodified Thornbury Township Zoning Ordinance July 10, 1998. Consequently, the 30-day County review period began on July 10, 1998. Upon receipt of our review CCPC# 2546, the Township indicated that it appeared that our copy of their Comprehensive Plan was out-of-date. The Township subsequently sent us a copy of the current Comprehensive Plan and this review reflects a revised version of review CCPC# 2546.

The Commission encourages the Township to adhere to the requirements of Section 301.3, 505.a and 609.e of the MPC, which require the municipality to submit all Comprehensive Plan. Subdivision and Land Development and Zoning Ordinance amendments to the County Planning Commission for review prior to adoption. Sections 305.b, 505.b and 609.g of the MPC require municipalities to send copies of adopted amendments to the County Planning Commission. We are better able to assist you with our reviews if we are in receipt of your current ordinances and plan.

We offer the following comments to assist in your review of the proposed map change and ordinance text amendment:

DESCRIPTION OF THE MAP CHANGE:

1. The applicant proposes to amend the zoning map by redesignating two parcels located on the north side of Dilworthtown Road (also referred to as Brinton's Bridge Road) from "A" Agricultural Residential to "B" Business zoning district. The parcels are identified as Tax Parcel 66-1-3, a 19.9 acre parcel and a 80,000 square foot parcel located immediately to the east of parcel 66-4-3. A tax parcel number for this parcel was not identified.

DESCRIPTION OF THE TEXT CHANGE:

2. Section 155-35, Permitted Uses in the "B" Business District, is deleted in its entirety. A new Section 155-35 is added which reproduces the same uses permitted by right in the deleted section and adds "Shopping Center Developments aggregating over 30,000 square feet" or more in gross floor area" as a conditional use, in accordance with Section 155-82.1.

3. Section 155-37.F, a special regulation pertaining to the maximum length or depth of a building (160 feet), is proposed to be deleted in its entirety.

4. Section 4 of the amendment would add a provision to Section 155-39.E(2) relating to parking provisions for "Shipping" (sic) Centers equalling one parking space for every 200 square feet of sales area. The spelling of this provision should be revised prior to adoption.

5. Section 5 of the amendment proposes additions to the Business District sign regulations to include provisions relating to pylon signs, building signs, free-standing business signs and under-canopy signs.

AREA EVALUATION:

6. Existing Land Use: Agricultural/Undeveloped

   Adjacent Land Use: North: Commercial, Stoltzfus RV/Marine
   East: Recreation, Penn Oaks Country Club
   South: Residential – Delaware County
   West: Residential – Birmingham Township

   Site Zoning: "A" Agricultural/Residential District

   Adjacent Zoning: North: "B" Business Stoltzfus RV Marine
   East: "A" Agricultural/ Residential
   South: Residential PRD-3 Thornbury Township, Delaware County
   West: Highway Commercial Birmingham Township

Comprehensive Plan: In the *Future Development* section of the Township Comprehensive Plan (Revised 1990) it states, in Section 6-11.C.4, "Except for present other nonresidential uses (e.g., the Concept School, The Penn Oaks Golf Course, etc.) the balance of the township, which basically consists of the area east of Route 202 and west of Westtown Station, should be preserved as a large lot residential district. In essence, the two poles of the Township, the Cheyney University and the area west of Route 202, will be development districts, with the center of the Township being maintained as a relatively undeveloped and open space area due to the existing floodplain restrictions."

The Chester County Comprehensive Plan, ***Landscapes***, designates the area of the proposed zoning map change as a Suburban Landscape. Suburban Landscapes include areas where infrastructure and public services have been, or should be, extended to accommodate residential development and shopping and employment centers. The Plan encourages design flexibility and a mix of density and uses, either through revitalization or infill, within the Suburban Landscape.

	The proposed use would be consistent with the recommended uses for the Suburban Landscape.
Circulation:	The site is located close to Route 202.
Water and Sewer:	The site would be served by on-site water and sewer.

COMMENTS ON THE MAP CHANGE:

7. The Comprehensive Plan indicates that the "poles" of the Township is where development should be directed. If this statement still reflects the future land use policies of the Township, it would indicate that the map change and ordinance text amendment are inconsistent and should not be approved. If the land use goals of the Township have changed, we recommend that the Comprehensive Plan be updated to define these new land use objectives.

8. Traffic on Route 202 has exceeded design capacity. The proposed use could have a significant affect on vehicle trip generation which would impact traffic congestion on Route 202. PennDOT has made commitments to address capacity improvements and is currently analyzing options relating to improvements at the intersection of Dilworthtown Road and Route 202. If the proposed Zoning Map Change is approved, we recommend that the Township, the applicant, Birmingham Township and PennDOT representatives from the Traffic Unit and the Project Manager for the Route 202 improvements meet to identify the most appropriate treatment for improvements at the Dilworthtown Road/Route 202 intersection and in particular, design options for the northeast quadrant of the intersection.

9. The proposed use could have significant traffic impacts on the surrounding road network particularly the intersection of Dilworthtown Road and Route 202. If the proposed Zoning Map change is approved, we recommend that the Township request a Traffic Study to determine the affects of and to devise strategies to offset any negative impacts generated by the proposed shopping center.

COMMENTS ON THE ZONING TEXT ORDINANCE AMENDMENT:

The following comments are only applicable if the proposed zoning map change is approved.

10. We acknowledge that the conditional use process is an appropriate method for permitting land uses that have the potential to generate significant impacts. As proposed, the provision to permit shopping centers by conditional use only establishes a lower limit on square footage. We suggest that a maximum square footage for this use be incorporated into the amendment.

11. Section 3 of the amendment proposes to delete an existing provision that limits the greatest dimension of any building to 160 feet. We suggest that the Township consider how the intent of this provision to prohibit long unbroken facades or walls of commercial buildings, could be maintained while permitting the economies of scale associated with current construction practices.

12. The parking provisions proposed in Section 4 of the amendment appear to be consistent with current commercial standards. The Township should verify that the quantity of parking proposed is consistent with similar uses and the Township's policy related to

impervious surfaces. The spelling in this provision should be verified prior to adoption.

13. We recommend deleting the phrase "direct external illumination. . . ." in the provision proposed in Section 155-51.B.4.1.e as an ineffective lighting strategy. Internal illumination would also be consistent with the building sign provisions of the following subsection.

14. The pylon sign provision for free standing buildings within the shopping center is unnecessarily duplicative of the shopping center pylon sign provisions and should be removed. Free standing buildings signage should be permitted on the shopping center pylon sign(s).

RECOMMENDATION: We recommend that the zoning map change and zoning ordinance change not be approved because they are inconsistent with the land use policies adopted in the Township Comprehensive Plan and because of the significant affects that the proposed use would have on the local road network.

We request an official copy of the decision made by the Board of Supervisors, as required by Section 609(g) of the Pennsylvania Municipalities Planning Code. This will allow us to maintain a current file copy of your ordinance.

Sincerely,

/s/ William H. Fulton
William H. Fulton, AICP
Secretary

WHF/GPB/kp

cc: Charles A.W. Wilson, Board of Supervisors Chairman
Constance T. Dulin, Secretary
Ronald Miller, Planning Commission Chairman
Barbara Iacovelli, Planning Commission Secretary

EXHIBIT 28

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION

- - -

THORNBURY NOBLE, LIMITED	:	NO. 99-CV-6460
vs.	:	
THORNBURY TOWNSHIP, CHESTER COUNTY, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, the Members of the Board of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON and ROBERT MacDONNELL	:	

March 29, 2001
Exton, Pennsylvania

Oral Deposition of CHARLES A.W. WILSON, taken in the Law Offices of FOX, ROTHSCHILD, O'BRIEN & FRANKEL, LLP., Eagleview Corporate Center, 760 Constitution Drive, Exton, Pennsylvania, commencing at 10:20 a.m., on the above date, before Eileen S. Arrison, Professional Court Reporter and Commissioner of Deeds.

* * *

[127] making that statement?

A. I remember a concern. Again, about the success or lack therefore of the 926 and 202 situation. And from a – I would have to say I'm overstating my position here by saying we, this would have to be an I, or should be an I – and I would say my view here was that I probably had come to feel that if there were – there was probably likely to be one supermarket built. And what I'd be referring to here is that my preference would be that it end up on the Water's tract because, my view would have been, that was probably key to them going forward with their project. If they didn't have that, I didn't know but I suspected, that their project wouldn't go.

Q. Was this discussed at the meeting with Kevin Lahn and Waters?

A. No, certainly not. It's not the type of thing that I would discuss with anybody.

Q. How did you know that there would only be one supermarket built?

A. I said that that was – that was my expectation. There's already an Acme at 926 and 202, there's already a Genuardi's at the Glen

* * *

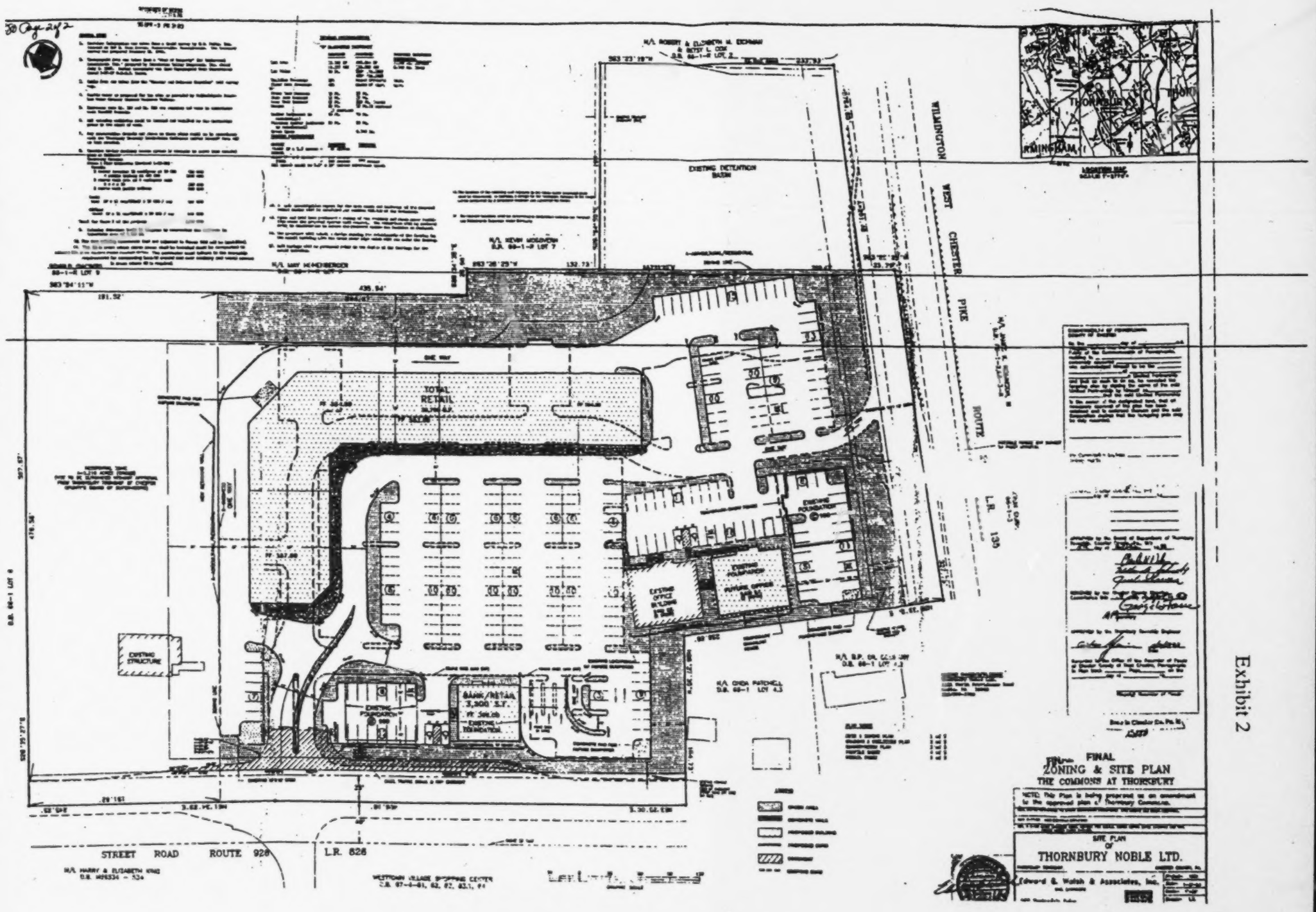


Exhibit 2

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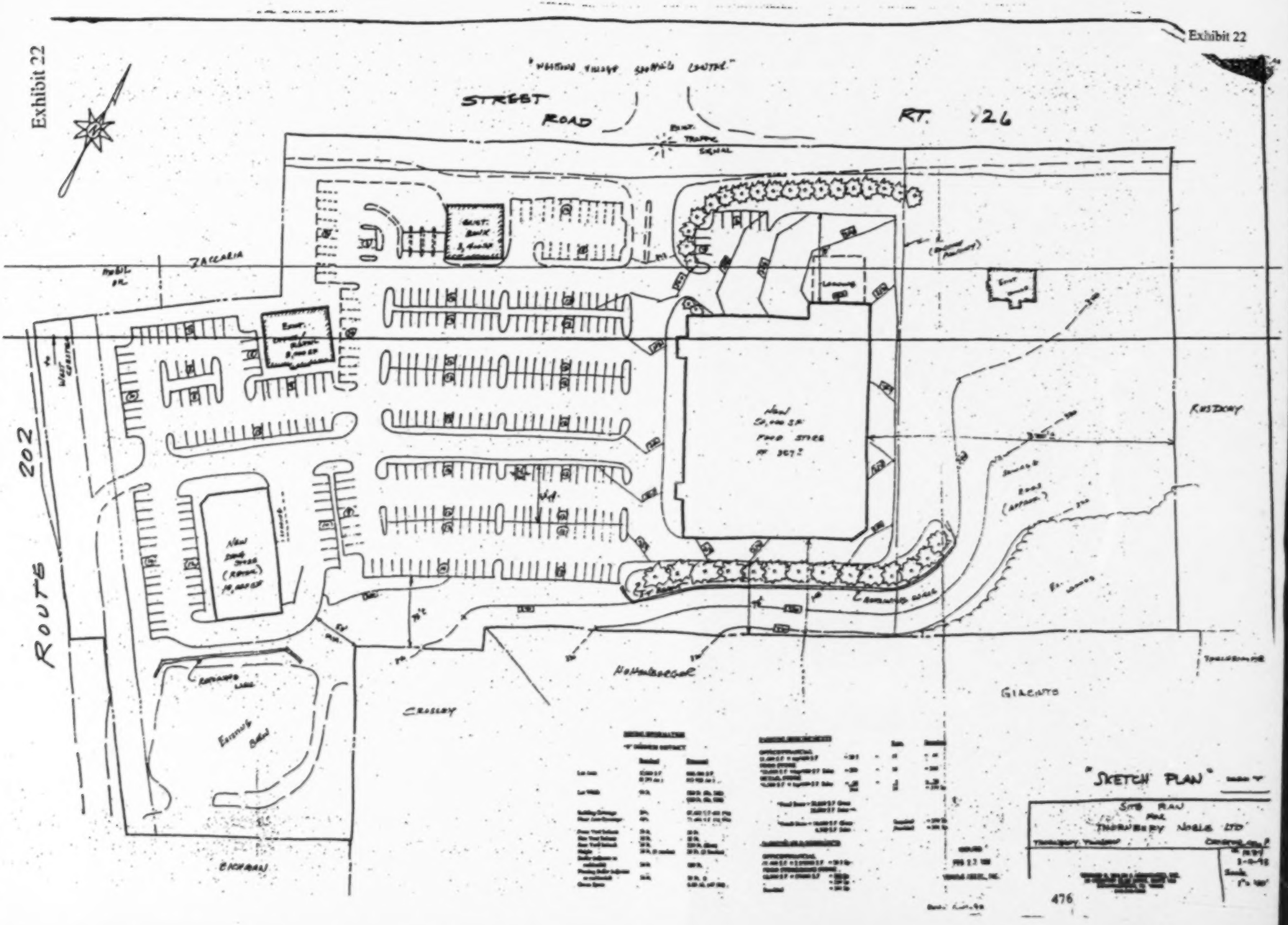
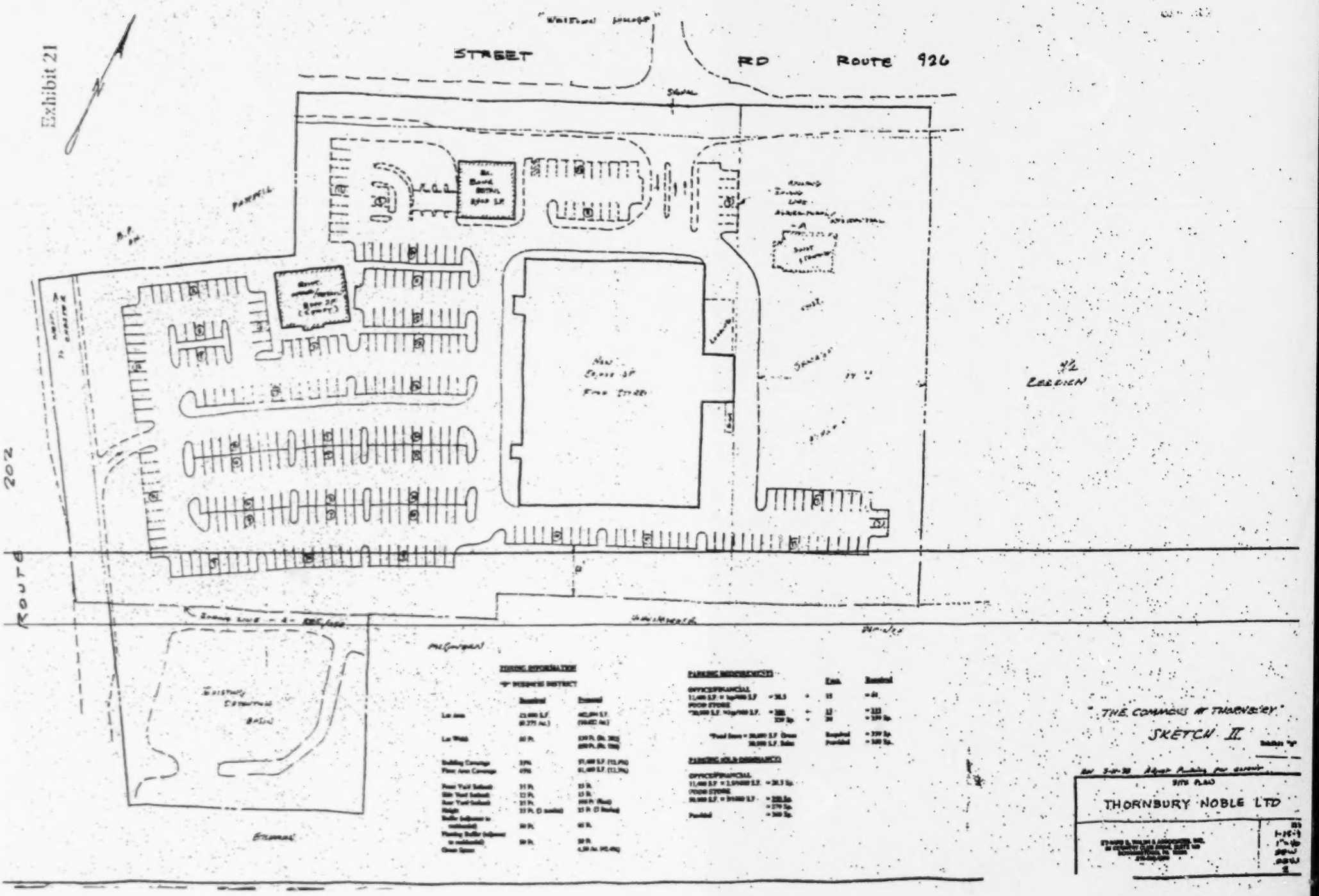

Exhibit 22
Exhibit 22
STREET
ROAD
RT. 126
ROUTE 202
"SKETCH PLAN"
476

Exhibit 21


STREET
RD
ROUTE 926
ROUTE
202
"THE COMMONS AT THORNBURY"
SKETCH II
THORNBURY NOBLE LTD

No. 04-1121

Supreme Court, U.S.
FILED
MAR 24 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THORNBURY NOBLE, LTD.,

Petitioner,

v.

THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the Members of the Board of Supervisors in their Official Capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON and ROBERT A. MacDONNELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS THORNBURY TOWNSHIP BOARD OF SUPERVISORS, PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON AND ROBERT A. MacDONNELL

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COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether the Third Circuit, in harmony with all other Circuit Courts that have ruled on the issue, properly held that Respondents' conduct did not "shock the conscience" in a constitutional sense after the Township denied the deficient land development application of a developer, in furtherance of legitimate municipal goals.

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COUNTER-STATEMENT OF THE CASE

Respondent Thornbury Township is a Township of the Second Class, duly organized under the Pennsylvania Second Class Township Code, 53 P.S. § 65101 *et seq*. The Township is governed by an elected five-member Board of Supervisors, which is responsible, *inter alia*, for enacting and amending zoning ordinances, making final decisions on land development plans in the Township, and for rendering decisions on applications for conditional uses in certain zoning matters.

At all times relevant to this dispute, Petitioner owned approximately ten acres of land located at the intersection of Routes 202 and 926 in Thornbury Township, Chester County, Pennsylvania. Petitioner purchased the property in the mid-1980's, as separate four-acre and six-acre tracts. At the time, the four-acre tract was zoned for commercial use, while the larger, six-acre tract was zoned for agricultural/residential use. In the late 1980's, nearly three acres of the six-acre tract were rezoned for commercial use at the request of Petitioner, in order that it could develop a complex of ten office buildings on the land. After only one of the buildings was built, Petitioner let the remainder of the project lay dormant for years.

Petitioner then chose to abandon the ten building office complex plan to instead develop the property as an L-shaped retail center. Petitioner submitted a new land development plan for the retail center in accordance with the Municipalities Planning Code ("MPC") and the Township's Subdivision and Land Development Ordinance ("SALDO"). On October 5, 1993, the Township approved

the new land development plan.[1] Thereafter, the Board of Supervisors granted Petitioner's repeated requests for extensions to record the plans, and, on March 7, 1995, the Board ratified the final plans to permit Petitioner to develop the retail center pursuant to the L-shaped design.

In December 1997, Petitioner once again changed course. Petitioner chose to do so after failing to secure potential tenants for its L-shaped development, and after receiving letters of interest from two grocery chains who wished Petitioner to develop the property as a 50,000 to 55,000 square foot box shaped supermarket. Given this interest, Petitioner entered into a non-binding proposal

---

[1] A brief description of the land development process under Pennsylvania law is pertinent for an analysis of the present matter. Under the Pennsylvania Second Class Township/Municipalities Planning Code, a developer can initiate the land development process by submitting a "sketch plan" to the Township. Petitioner's App. 135. A "sketch plan" is an informal draft of the plan to be proposed, which is voluntarily submitted by a developer to engage the Township in informal discussions as to the plans. Petitioner's App. 135. The sketch plan "does not constitute submission of an application for approval of a subdivision or land development plan." Petitioner's App. 135. In order to start the formal review process, the developer submits a "preliminary plan," which sets forth in detail all required data for the development. Petitioner's App. 136. Once a preliminary plan is submitted by a developer, the Township reviews the plans and provides the developer with a list of the defects that must be addressed for preliminary plan approval pursuant to the Municipalities Planning Code and Subdivision and Land Development Ordinance. Petitioner's App. 138-39. After the developer makes all necessary revisions, or alternatively, when the developer believes its preliminary plans to be complete, the Township will vote to accept or reject the preliminary plans. Petitioner's App. 138-39. If the developer believes that a municipality improperly rejected its plan after any vote, the developer has the right to appeal that decision to the Pennsylvania Court of Common Pleas. Thereafter, a land developer must then submit final plans for further review and approval by the Township. Petitioner's App. 142.

with one of the grocery chains, Genuardi's, on December 5, 1997. In this non-binding proposal, Petitioner and Genuardi's agreed that Petitioner would attempt to secure a zoning change within twelve months of the date of the proposal. The zoning change was to be sought by Petitioner because it desired to re-locate the building closer to the rear property line (i.e., closer to the residential district). Petitioner's proposed relocation would require two acres of land to be rezoned from residential to commercial, thereby eliminating any buffer zone between nearby residences and the proposed supermarket. It merits emphasis that both Courts below noted that Petitioner could have built the box-shaped building on the portion of its property then zoned for commercial use, but instead sought to shift its development on to the land zoned for residential use. Petitioner's stated basis for this encroachment was to improve access to the supermarket.

Petitioner presented a sketch plan of the proposed box-shaped supermarket on December 16, 1997. This sketch plan laid out a 50,000 to 55,000 square foot box shaped supermarket in lieu of the previously approved L-shaped building plans. When Petitioner inquired about the prospect of rezoning the two acres of land, the Board advised that it would like to review the plans before discussing zoning relief.

In early 1998, Petitioner complicated matters by appointing a new individual to head its development of the subject property. This individual was inexperienced in land development projects and proceeded under the mistaken belief that all necessary approvals were in place (i.e., under the mistaken belief that Petitioner had obtained final plan approval for its box-shaped design). Petitioner took no further action until July 7, 1998, when

it presented a different sketch plan to the Board, calling for a 50,000 square foot grocery store and a 10,000 square foot drug store in lieu of the L-shaped retail center.

At the July 7, 1998, Township meeting, Petitioner again raised the issue of rezoning a portion of the subject property from agricultural/residential to commercial. During these discussions, one of the Supervisors inquired as to whether Petitioner had any interest in helping the Township with an open space contribution to compensate for the loss of residential zoning. Petitioner responded that it would consider an open space contribution only if it was required to do so by the Township Ordinances. As any open space contribution was voluntary, Petitioner was not required to provide it, and, indeed, chose not to do so. The meeting was concluded with no decision as to rezoning having been made.

At the next public Township meeting on August 4, 1998, Petitioner provided no additional information in support of its need for rezoning and presented no preliminary plan. Shortly thereafter, in October 1998, Genuardi's withdrew its letter of interest, and Petitioner began discussions with the other large grocery chain, SuperFresh, about the prospect of building a box-shaped grocery market. Pursuant to the nonbinding agreement entered into between SuperFresh and Petitioner, SuperFresh was responsible for securing all government approvals.

On October 6, 1998, Petitioner submitted a document labeled "Application for Amended Final Plan Approval or, in the alternative, for a Zoning Map Amendment." This submission included two hand-drawn **sketch plans** of a proposed big box supermarket in place of the approved L-shaped strip retail center. The first sketch plan depicted a

proposed big box supermarket wholly within the commercially zoned tract. The second sketch plan depicted a proposed supermarket partially on the nearby residential property, which would require rezoning approximately two acres of this agricultural/residential tract. The October 6, 1998, submission, however, did not constitute a formal application for land use approval since the sketch plan did not include the **required** fully engineered preliminary plan. The Township's Solicitor advised the Township that was a *new* plan, presented as a sketch only, and therefore the Board was not obligated to take any action until a preliminary plan was filed. Moreover, the Township engineer reviewed Petitioner's submissions and determined, *inter alia*, that both sketch plans required numerous revisions in order to comply with the Township Zoning Ordinance.

The sketch plans were discussed at the Township Planning Commission on October 14, 1998. Petitioner advised the Commission that its purpose for attending this meeting and the Board meeting in November 1998 was to see if the Board would rezone the tract. The Township engineer offered his comments at the meeting, and the Planning Commission members asked Petitioner's counsel to submit a plan combining certain aspects of both sketch plans. However, no such plan was ever presented to the Township. One of the Supervisors stated that the Board was not in favor of rezoning the property, which had previously been rezoned for expanded commercial use. Petitioner was again advised that it must go through the proper land development process. Petitioner ignored this advice.

Meanwhile, another developer, R.J. Waters & Associates, sought to develop a large supermarket on its own property in Thornbury Township. R.J. Waters applied for and received approval for its development in properly submitting its preliminary and final development plans to the Board in accordance with the well-established land development process. In addition, Waters agreed to contribute $600,000 to the Township for the express purpose of purchasing additional open space, since Waters' development project would reduce existing open space in the Township.

Before the end of March 1999, Petitioner decided to build the L-shaped strip mall as previously approved. On April 7, 1999, Petitioner filed an application for a building permit to construct the L-shaped retail strip center. The Township issued the permit, and Petitioner built out the L-shaped strip mall, which is open and operating today.

The District Court for the Eastern District of Pennsylvania initially dismissed the Section 1983 claims against the individual Defendants in their official capacities, but, in utilizing an "improper motives" analysis, otherwise denied summary judgment with respect to Petitioner's substantive due process claim. Respondents renewed their Motions for Summary Judgment after the Third Circuit issued its decision in *United Artists, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003), in which the Third Circuit abrogated the use of the "improper motives" analysis in favor of the "shocks the conscience" test in a land use setting. The District Court held that the actions of Respondents did not satisfy the "shocks the conscience" standard, and dismissed Petitioner's remaining claims. The United States Court of Appeals for the

Third Circuit agreed and affirmed the District Court's decision. Petitioner sought an *en banc* rehearing before the Third Circuit, which was denied. The instant Petition for Writ of Certiorari followed.

SUMMARY OF THE ARGUMENT

When the Third Circuit decided the case of *United Artists, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003), it brought the Third Circuit into harmony with all other Circuit Courts that have ruled on the issue of the appropriate standard to apply in land use disputes when a developer asserts a Section 1983 civil rights claim based upon an alleged deprivation of substantive due process under the Fourteenth Amendment to the U.S. Constitution. Both the Trial Court and the Third Circuit properly applied the "shocks the conscience" standard when they determined that the undisputed facts of record warrant summary judgment in favor of the individual Township Supervisors and the Township. Indeed, there is no circuit split as to this issue, and the adoption of the "shocks the conscience" standard comports with existing Supreme Court precedent.

There is no need for further "definitional analysis" to allow the Circuit Courts of this land to decide substantive due process claims in land disputes. The Circuit Courts have appropriately applied the "shocks the conscience" standard to prevent run-of-the-mill zoning disputes from being transformed into Federal Constitutional causes of action. Indeed, the actions of the Supervisors in the case at bar fall within the "environment of land use planning," an area of state law in which the federal courts do not

interfere in the absence of a violation of a constitutionally protected right.

Moreover, Petitioner grossly mischaracterizes the nature of the voluntary open space contribution made by another developer. Respondents did not engage in any violation of state law, and neither of the lower courts have so determined. The evidence of record does not support Petitioner's characterization, nor does it support that a voluntary contribution equates to a "zoning for sale." Neither of the lower courts have so held.

Lastly, to the extent that Petitioner claims that its alternative development plan should have been approved, their claim is not ripe. Petitioner never obtained the necessary preliminary or final plan approvals for its proposed development. Accordingly, the instant Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

1. The "shocks the conscience" standard provides a sufficient basis for Circuit Courts to decide substantive due process claims in land use matters.

While Petitioner argues that there is a need for this Court "to provide a cogent definitional analysis" of the standard to be employed in substantive due process claims, the argument fails for two equally compelling reasons. First, the Circuit Courts have applied the "shocks the conscience" standard in land use cases for decades. *See, e.g., Pearson v. City of Grant Blanc*, 961 F.2d 1211 (6th Cir. 1992); *Southern Pacific Transportation Co. v. Los Angeles*, 922 F.2d 498 (9th Cir. 1990); *Cloutier v. Town of*

Epping, 714 F.2d 1184, 1189 (1st Cir. 1983). The Circuit Courts have been able to reach their decisions throughout the years without the "cogent definitional analysis" that Petitioner believes is so sorely needed in this area of the law. Petitioner's claim that a cogent definitional analysis is needed is belied by the established history of the lower courts ably reviewing substantive due process claims in land use matters. Conspicuous by its absence is any citation to a Circuit Court decision that cries out for greater guidance.

Second, Petitioner's argument fails given that this Court adopted the "shocks the conscience" standard knowing full well that it is not a precise standard. *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) ("[t]he measure of what is conscience shocking is no calibrated yard stick."). Rather, the standard must be applied to each case independently. *Id.* at 850. The Court has provided sufficient guidance as to how the lower courts should apply the "shocks the conscience" standard, as set forth below. Petitioner would have this Court reverse the decades-old case-specific application of the "shocks the conscience" standard, and replace it with a formulaic, one-size-fits-all definition. Moreover, Petitioner so argues without providing any hint as to what new analysis would be applied.[2] The "shocks the conscience" standard does not

[2] Petitioner's citations to *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), are inapposite. Neither of those decisions involved substantive due process challenges, and indeed, explicitly rejected the notion that those decisions would apply to substantive due process claims. *Nollan*, 483 U.S. at 836 n.4 ("[T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process

(Continued on following page)

need a new definitional analysis, and Petitioner's request must be denied.

2. The Third Circuit's "shocks the conscience" analysis comports with Supreme Court Precedent and does not conflict with the decision of any other Court.

The decisions by the Courts below do not conflict with any decision of this Court, any Court of Appeals, or any other Court in the United States. Application of the "shocks the conscience" standard as addressed by the court below developed out of this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

In applying the "shocks the conscience" standard espoused in *Lewis*, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id.* at 845-46. The Due Process Clause is violated by executive action only when it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. *Id.* at 845-46 (citation omitted). *See also Fagan v. City of Vineland*, 22 F.3d 1296, 1303 (3d Cir. 1994) (*en banc*) ("[T]he substantive component of the Due Process Clause can only be violated by governmental employees when their conduct amounts to an abuse of official power that 'shocks the conscience.'").

Subsequent to the *Lewis* decision, the Third Circuit issued its ruling in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003), in

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challenges, and equal protection challenges are identical."). *See also Dolan*, 512 U.S. at 384 n.5.

which it held that the "shocks the conscience" standard applies in cases involving substantive due process challenges to municipal land use decisions. The *United Artists* decision brought the Third Circuit in line with other Circuit Courts that have addressed the issue. *Id.* at 402. *See, e.g., Conroe Creosoting Co. v. Montgomery County, Texas*, 249 F.3d 337 (5th Cir. 2001) ("Where a state official deprives a corporation of its property in a manner that 'shocks the conscience,' substantive due process may be violated."); *Pearson v. City of Grant Blanc*, 961 F.2d 1211 (6th Cir. 1992) (only actions which "shock the conscience" may violate substantive due process); *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104-05 (8th Cir. 1992) (holding that allegations that the city arbitrarily applied a zoning ordinance were insufficient to state a substantive due process claim, and stating that the "decision would be the same even if the City had knowingly enforced the invalid zoning ordinance in bad faith .... A bad-faith violation of state law remains only a violation of state law."); *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 32 (1st Cir. 1991) ("Even assuming that ARPE engaged in delaying tactics and refused to issue permits for the [development] project based on considerations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations of the federal constitution under a substantive due process label."); *Southern Pacific Transportation Co. v. Los Angeles*, 922 F.2d 498 (9th Cir. 1990) (Ninth Circuit will subject local zoning decisions to substantive due process review, but the scope of review is that for legislation, even as to an individual property owner's claim, and any relationship to a proper zoning goal, such as prevention of traffic congestion, will be sufficient); *Cloutier v. Town of Epping*, 714 F.2d 1184, 1189 (1st Cir. 1983) (holding that

substantive due process is not violated by local zoning even when accompanied by claims of purposeful malicious obstruction of a landowner's rights, that included alleged abuse of process, perjury, failing to come forward with material evidence, and giving false information to a state agency about the plaintiffs).

In applying this standard in the land development context, the conduct of township officials in denying a land development plan fails to shock the conscience (even if motivated by personal animus) when there exists a rational basis for a land use decision for the denial. *See Sameric Corp. of Delaware v. City of Philadelphia*, 142 F.2d 582, 595-96 (3d Cir. 1998) (only relevant inquiry in the review of a land use decision made by a local government agency was whether the decision was rationally related to land use planning); *Bituminous Materials, Inc. v. Rice County*, 126 F.2d 1068, 1070-71 (8th Cir. 1997); *Kantner v. Martin County*, 929 F. Supp. 1482 (S.D. Fla. 1996). *See also Cornneal v. Jackson Township*, 2004 WL 790315, at *2 (3d Cir. April 13, 2004).

In the present matter, both the Third Circuit and the District Court held that none of the actions taken by the municipal officials shocked the conscience. Indeed, the record unquestionably supports those holdings below. Petitioner inappropriately attacks these decisions on two grounds: 1) that actions of the Township officials constituted a violation of state law in violation of their rights to substantive due process; and 2) that the federal courts should not have given deference to the conduct of local municipalities in applying the "shocks the conscience" standard to the instant matter.

i) Acceptance of the voluntary open space contribution did not constitute a violation of state law and is not sufficient to "shock one's conscience."

Petitioner has grossly mischaracterized the voluntary open space contribution as a violation of state law. None of the evidence proffered through discovery supports this position, and neither the Third Circuit nor the District Court so determined. As to this issue, the Third Circuit determined that "the most nefarious interpretation of the events that transpired before the Board would be that the Board privileged Water's zoning request over Noble's in exchange for Water's $600,000 contribution to the Township for the purchase of open space." *Thornbury Noble*, 112 Fed. Appx. 185, 188 (3d Cir. Oct. 18, 2004). The Third Circuit aptly noted that such "actions of the Board would still not rise to the level of shocking the conscience because it is well settled that the preservation of open space is a legitimate municipal goal." *Id.*, *citing Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980), *overruled on other grounds by First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987). No state or federal court has ever held that a municipality is barred from requesting that a developer voluntarily help reduce the impact of commercial development as part of the process of rezoning land from residential/agricultural to commercial. It thus merits emphasis that the Third Circuit did *not* determine that acceptance of the voluntary open space contribution from Waters was a bribe or was otherwise in violation of state law.

More to the point, the claim that the Township violated state law by engaging in "contract zoning" with R.J.

Waters is a red herring. Petitioner cannot demonstrate a violation of *its* substantive due process rights by alleging an unlawful transaction between the Township and some other developer concerning an entirely different property. Petitioner improperly attempts to fuse concepts of equal protection (which is not at issue before this Court) with the substantive due process analysis.[3]

It is interesting that Petitioner complains about the "Waters deal," when the record contains no evidence that Waters was the victim of "unlawful extortion." The record is devoid of any suggestion that the contribution by Waters to preserve open space was anything but voluntary and proper. If Petitioner truly believed that the Waters' approvals were improper, Petitioner could have availed itself of the appeal procedures available under the Municipalities Planning Code. *See, e.g.*, 53 P.S. § 101006-A "Judicial Relief (a) In a land use appeal, the court shall have the power to . . . set aside or modify any action, decision or order of the governing body. . . ." 53 P.S. § 101006-A.

The concept of contractually conditioned zoning was addressed by the Pennsylvania Supreme Court in *Carlino v. Whitpain Investors*, 499 Pa. 498, 453 A.2d 1385 (1982), where the Court held that agreements between a municipality and a landowner that *restrict* the use of rezoned property are unenforceable. *Id.* at 1388. Importantly, the Court distinguished the facts presented in *Gladwyne Colony, Inc. v. Lower Merion Township*, 409 Pa. 441, 187

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[3] Petitioner never pursued an equal protection claim in this matter. Nevertheless, had Petitioner preserved the issue of whether a viable equal protection claim exists, the record is devoid of evidence that R.J. Waters was similarly situated or that the Township lacked a rational basis for treating Petitioner differently than R.J. Waters.

A.2d 549 (1963), where the Court *upheld* an agreement between a municipality and a landowner whereby the landowner gave consideration (parkland) to the municipality in exchange for rezoning.

In the instant case, Petitioner's contract zoning theory is flawed for the same reasons stated by the Pennsylvania Supreme Court in *Gladwyne*, since Petitioner does not allege, nor does the record reflect, that the amended zoning ordinance is arbitrary or unreasonably discriminatory or without substantial relation to the public health, safety and welfare.[4] Petitioner's claim of contract zoning is unsupported and falls of its own weight.

Moreover, Petitioner has cited no caselaw to support that there is any circuit split or other unresolved issue of federal law as to whether an alleged violation of state law can satisfy the "shocks the conscience" standard. The Circuit Courts are in agreement as to this issue, which further comports with Supreme Court precedent. "As has been often stated, '(t)he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution.'" *Estabrook*, 680 F.2d at 833, *citing Crocker v. Hakes*, 616 F.2d 237, 239 n.2 (5th Cir. 1980) (per curiam). *See also Paul v. Davis*, 424 U.S. 693, 700, 96 S. Ct. 1155, 1160, 47 L. Ed. 2d 405 (1976), *quoting Screws v. United States*, 325 U.S. 91, 108-09, 65 S. Ct. 1031, 1038, 89 L. Ed. 1495 (1945) ("Violation of local law does not necessarily mean that federal rights have been invaded."); *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S. Ct. 397, 401, 88

[4] It should be noted that an amendment to the zoning ordinance is presumptively valid and that the burden rests heavily upon the Petitioner to demonstrate that the amendment is unconstitutional. *Milk Control Commission v. Battista*, 413 Pa. 652, 198 A.2d 840 (1964).

L. Ed. 497 (1944) ("[N]ot every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another."). Accordingly, Petitioner's claim that the Township "sold" zoning to another developer in obtaining an open space preservation fee is neither a valid characterization of the record and the holdings below, nor is it a valid basis upon which to conclude that actions of Respondents shocked the conscience.

ii) The "shocks the conscience" standard appropriately reflects the wariness of the federal courts from intervening in local land use decisions.

The Third Circuit is also in agreement with all other Circuit Courts that have ruled on the issue as to the wariness of federal courts in adjudicating the rights and wrongs of local planning disputes. The *United Artists* Court noted that the federal courts should be cautious in adjudicating the rights and wrongs of local planning disputes. *United Artists*, 316 F.3d at 402, *citing Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982), and *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45-46 (1st Cir. 1992). The court explained that the "shocks the conscience" standard "prevents [Federal Courts] from being cast in the role of a "zoning board of appeals." *United Artists*, 316 F.3d at 402. "It is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983." *Id.* The courts have aptly noted that "every appeal by a disappointed developer from an adverse ruling

by a local planning authority involves some claim that the authority exceeded, abused, or distorted its legal authority in some manner. . . ." *Estabrook*, 680 F.2d at 833. *See also Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988) (Strong disapproval of federal courts' reviewing local zoning matters; any action by the local legislative body on a zoning matter is legislative, and thus non-reviewable.).

The inappropriateness of allowing every zoning dispute to transform into a federal Constitutional claim is further manifest in that there are adequate state law remedies to vindicate these claims without resort to a federal court. *See Parratt v. Taylor*, 451 U.S. 527, 542, 101 S. Ct. 1908, 1916, 68 L. Ed. 2d 420 (1981). *Cf. Kent Island Joint Venture v. Smith*, 452 F. Supp. 455 (D. Md. 1978) (district court abstaining in case where local officials approved allegedly "unreasonable" water and sewer rules in order to frustrate local developer). The reluctance of the federal courts to interfere with local land use decisions is further consistent with the absolute immunity afforded to local authorities in making zoning determinations. *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998).

Accordingly, the Third Circuit properly applied the "shocks the conscience" standard in the instant matter. Petitioner's Writ of Certiorari should not be granted in this matter given that there is no dispute between the Circuits as to this issue, and existing Supreme Court precedent supports the Third Circuit's ruling. Thus, Certiorari should be denied.

3. Petitioner's Claim is not ripe.

Review of the instant matter is further inappropriate as Petitioner's claim is not ripe. Following Petitioner's decision to abandon the approved office campus concept, Petitioner obtained final plan approval to construct the L-shaped retail center. Rather than complete this project, Petitioner attempted to again change course by proposing to construct entirely different buildings, i.e., a 50,000 square foot supermarket and a 10,000 square foot drug store. While Petitioner was certainly free to pursue this concept, Petitioner failed to submit properly engineered plans as required by the Pennsylvania Municipalities Planning Code and the Pennsylvania Subdivision and Land Development Ordinance. Rather, Petitioner only submitted sketch plans and nothing more. The identical error was committed by the plaintiff developer in *Marriott Senior Living Services, Inc. v. Springfield Township*, 78 F. Supp. 2d 376 (E.D. Pa. 1999). The *Marriott* Court held that plaintiff's Section 1983 claim was not ripe because the submission of *sketch plans* for a proposed land development under Pennsylvania law does not provide a municipality with an opportunity to review the plan in its preliminary or final form in accordance with the governing land use ordinances.[5]

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[5] The term "sketch plan" is conspicuously absent from Petitioner's brief. Petitioner refers only to its "application," which in reality was only a sketch plan. As stated *supra*, the Township is not required to take any official action on a sketch plan, and such does not satisfy the requirements of Pennsylvania law in regard to land developments. Petitioner presented no evidence below that refutes the findings of the Township Engineer, who identified a multitude of deficiencies with Petitioner's incomplete sketch plans.

In the absence of a final review or denial of appropriately submitted land development plans of Petitioner by the municipality, Petitioner's Section 1983 claim in the instant case is not ripe for adjudication. Here, Petitioner had failed to submit any preliminary plans for the box-shaped development proposal, and did so only in sketch format. It merits emphasis that the individual in Petitioner's business who took control of the project had no experience in the land development procedures and was under the mistaken belief that final approvals had been obtained. In reality, however, final approvals had only been obtained from the L-shaped development, not the box-shaped design. Accordingly, Petitioner was not entitled to any plan approvals and Petitioner's substantive due process claim is unripe. Thus, Petitioner's Petition for Writ of Certiorari should not be granted.

CONCLUSION

Petitioner's Writ of Certiorari should not be granted in this matter. The Circuit Courts have appropriately applied the "shocks the conscience" standard in land use cases for decades in congruence with Supreme Court precedent. Additionally, while Petitioner demands a more cogent standard, the necessity for such is obviated by this Court's acknowledgement that "shocks the conscience" is not a precise standard, but must be applied to each matter independently.

Moreover, the decision of the Third Circuit in the *Thornbury Noble* does not conflict with any other federal court decisions. Its conclusions as to the application of the "shocks the conscience" standard and the degree of conduct

sufficient to satisfy this standard are well established in other Circuit Courts and are supported by existing Supreme Court precedent. There is no circuit split as to this issue.

Also, Petitioner grossly mischaracterizes the nature of the voluntary open space contribution as being a violation of state law, when in fact neither of the Courts below has so held. Thus, the basis for Petitioner's claim on appeal (i.e., that the municipal officials engaged in conscience shocking conduct by violating state law) is not supported by the record and did not constitute the basis for the decisions below. Lastly, review of the instant matter is further inappropriate as Petitioner's claim is not ripe. Accordingly, the grant of Certiorari is not warranted in this matter.

Wherefore, for the above reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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